**UNIVERSITY OF NAIROBI**

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**RESEARCH PROJECT**

# THE COMMISSION ON ADMINISTRATIVE JUSTICE: EVALUATING THE CHALLENGES AND PROSPECTS IN IMPROVING ACCESS TO JUSTICE IN KENYA.

**SUBMITTED BY:**

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**A research paper submitted in partial fulfillment of the requirements for the award of the degree of Masters of Laws (LL.M**

**DECLARATIONS**

**Student's Declaration**:

I declare that this research paper is my original work and has not been presented before for a degree in this or in any other university:

Evelasia Wanjiru Maina

29/11/2021

Date

**Supervisor's Declaration:**

This research paper has been submitted for examination with my approval as university supervisor.

Dr. Seth Wekesa

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Date: **30/11/2021**



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## DEDICATION

This research paper is dedicated to the Commission on Administrative Justice Kenya. May you endeavor to enhance the access to justice to the general populace through the Commission.

**ACKNOWLEGMENT**

I sincerely thank God for the opportunity, the resources and wisdom to complete this study. I am grateful and acknowledge the guidance and insightful contribution of my supervisor, Dr. Seth Wekesa. I am grateful to Mr. and Mrs Maina -my parents for their steadfast love, encouragement and prayers throughout my study. I acknowledge the guidance and encouragement from my siblings John, Monica, Anthony, Grace, Gerald, Kennedy, George and Mary, no one does better than you. I appreciate my friends Noelle and Purity for encouraging me all along.

I am truly grateful and indebted.

**ABBREVIATIONS**

| | |
|---|---|
| ADR …….. | Alternative Dispute Resolution. |
| ATI…….. | Access to Information Act. |
| CAJ. ……. …. | Commission on Administrative Justice. |
| CSRC …… | Civil Service Review Committee. |
| EACC..... | Ethics and Anti-Corruption Commission. |
| DPP…… | Director for Public Prosecutions. |
| eKLR……. | Electronic Kenya Law Reporting. |
| KNCHR …….. | Kenya National Commission on Human Rights. |
| KNHREC…… | Kenya National Human Rights and Equality Commission |
| MDA …… | Ministries, Departments and Agencies. |
| PSSRC …….. | Public Service Structure and Remuneration Commission. |
| PCSC……. | Public Complaints Standing Committee. |
| OPP…… | Office of Public Protector |
| UDHR ……. | Universal Declaration of Human Rights of the United Nations. |
| UNDP …… | United Nations Development Programme |

## LIST OF STATUTES

Access to Information Act No. 31 of 2016.

Commission on Administrative Justice Act No. 23 of 2011.

Constitution of Kenya 2010

Constitution of the Republic of South Africa, 1996.

Commission on Human Rights and Administrative Justice Act-Ghana.

Executive Members' Ethics Act 82 of 1998-South Africa.

Fair Administration Act No. 15 of 2015.

Housing Protection Measure Act No. 95 of 1998-South Africa.

Kenya National Commission on Human Rights Act No. 14 of 2011.

National Gender and Equality Commission Act No. 15 of 2011

Public Office Ethics Act No. 4 of 2003.

Prevention and Combating of Corrupt Activities Act no 12 of 2004-South Africa.

Protected Disclosures Act No 26 of 2000-South Africa.

Promotion of Access to Information Act no 2 of 2000-South Africa.

## LIST OF CITED CASES

*Commission on Administrative Justice –vs- Kenya Vision 2030 Delivery Board and 2 Others. Civil Appeal No. 141 of 2015.*

*Economic Freedom Fighter –vs Speaker of the National Assembly and others [2016)] ZACC 11.*

*R –vs – Local Commissioners for Administration for North and East Area of England, Ex-parte Bradford Metro Politan Council [1979] 2 All ER 881.*

*Republic v Commission on Administrative Justice Ex-Parte National Social Security Fund Board of Trustees [2015] eKLR.*

*R – Local Commissioners for Administration for North and East Area of England, Ex-parte Bradford Metro Politan Council.*

*R –vs- Kenya Vision 2030 Delivery Board and another ex-parte Engineer Judah Abekah [2015].*

*South African Broadcasting Corporation Soc Ltd others –vs- Democratic Alliance and Others [2015] ZASCA 156.*

**ABSTRACT**

The purpose and scope of this paper is to evaluate the place of the Commission on Administrative Justice within the view of improving access to justice in Kenya. The objective is to understand the role of the ombudsman, and to determine its challenges and prospects. The research shall rely on the research questions, research objectives and the hypothesis in order to draw an accurate and valid conclusion. The paper will discuss the problem of access to justice in Kenya; how the introduction of the office of the ombudsman can be used to mitigate the challenge of access to justice and emerge as effective forum for access to administrative justice that is sustainable. The research methodology shall include research design around the qualitative and quantitative data collection and the analysis. The outcome shall be interpreted, discussed and the conclusion shall be used to test the hypothesis. The research shall involve documentary and content analysis of legal documents, case law, publications on the administrative justice and online search.

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# CHAPTER ONE

## THE CONCEPT OF OMBUDSMAN

### 1.0 The concept of Ombudsman

This portion discusses the history of ombudsman and gives an overview of the concept of ombudsman. It evaluates the place of the Commission on Administrative Justice in Kenya from historical perspective. The Commission on Administrative Justice is denoted as ombudsman office (hereinafter referred to the Commission).

Linda C. Reif traces the concept of ombudsman to the Swedish Ombudsman which was instituted in 1809 and the word ombudsman is interpreted to mean a representative[1]. Linda explains that the Swedish Ombudsman referred to as *justitieombudsman* was instituted when the Swedish King went to Turkey after military defeat by Russia[2]. She states that the King observed that the administration had deteriorated, the King appointed an official to monitor administration and judiciary. If violation of law or misconduct had been discovered, the official could institute legal proceedings against the wayward official[3].

Migai Aketch posits that ombudsman originated in Sweden and grew along as state administrative came into direct contacts with citizens[4]. He observes that a good administrative system had to establish mechanism for speedy resolution of maladministration and providing suitable remedies[5]. He posits that the ombudsman is seen as an "institution that receives

[1] Linda C. Reif, *The Ombudsman, Good Governance and The International Human Rights System*, (Martinus Nijhoff Publisher2004) pg 15.
[2] Ibid.
[3] Ibid.
[4]Migai Akech, *Administrative Law*, (University of Strathmore Press, Nairobi, 2016), pg 392.
[5] Ibid.

complains from an aggrieved person against government agencies, officials and employees, or acts on its own motion, and has power to investigate, recommend corrective actions and issue reports"[6].

The ombudsman also seen as an office established under a constitution or law and lead by a high level official. The Ombudsman Committee of the International Bar Association postulates that such official is answerable to the parliament and receives complaints from the general populace, can act on own accord, has powers to examine any complaint and submit a report.[7]

From above definitions, the ombudsman office is seen as an office established to receive complaints from public on various grievances and malpractices by state agencies/officials. Other countries adopted the ombudsman concept from the twentieth century in effort to curb malpractices by state officials. For instance, Anand Satyanand argues that New Zealand was the first English-speaking state to introduce the ombudsman and was referred to as the Parliamentary Commissioner for Investigations in 1962[8]. Anand emphasizes on the need to establish the office as citizens needed a cheap, accessible forum besides the court system and the reports to parliament[9].

[6] Supra n 4 at 393.
[7]Charles Fers *et al*, 'Brief on the office of the ombudsman', *occasional paper no. 6*(1980) available at http://www.theioi.org/downloads/epr4c/IOI%20Canada_Occasional%20Paper%2006_Charles%20Ferris_Brief%20on%20the%20Office%20of%20the%20OM_EN_1980.pdf accessed on 17/1/2017.
[8]Anand Satyanand, 'The Ombudsman Concept and Human Rights Protection', *Sessional paper no. 68* (1999),available at https://www.victotia.ac.nz>law accessed on 17/1/2017.
[9] Ibid.

In Canada, Donald Rowat[10] noted the need to introduce the ombudsman office to enable public get redress for maladministration. He noted that citizen's rights were interfered with by the government's administrative machine[11]. He noted that arbitrary or unjustified decisions were made by government affecting citizens and there was no forum for the ordinary citizen to gain redress[12].

The institution which was to be established with various feature described as follows. The institution is to be instituted under the constitution or statute so ensure its independence and neutrality; the institution can act on its own motion or receive complain or against government or its agencies; the institution can hear such complaint and make recommendation to remedy the complaint; if the state agency doesn't comply with the recommendation, the institution can report to the parliament but can only make recommendation and not binding decisions which makes it different from court or arbitrator[13].

From the above, in most jurisdictions the ombudsman concept was introduced to address maladministration in public service. In some jurisdictions however, the ombudsman concept was extended to private institutions. S Van Roosbroek for instance observes that in the 1960s, ombudsman concept in Belgium was been extended to private sector and non-profit sector, such as universities, media, corporations and hospitals[14]. The above part highlights the need to establish an institution to give redress for maladministration by government agencies in various

[10] D. Rowat, 'An Ombudsman Scheme for Canada" (1962), *28 Can. J. Econ. & Pol. Sci.*at 253
[11] Ibid.
[12] Ibid.
[13] Ibid.
[14] Van Roosbroek, S. and Van de Walles., 'The relationship between ombudsman, government, and citizens: A survey analysis' *Negotiation Journal, 24(3*), pg.287.

jurisdictions hence the concept of the ombudsman. The section below discusses the establishment of the Ombudsman in Kenya.

In Kenya, the need to establish the ombudsman office was highlighted by the Ndegwa Commission known as Commission of Inquiry (Public Service Structure and Remuneration Commission-PSSRC). This was due to prevalent maladministration and administrative injustices in public service delivery and citizens did not have an appropriate forum to seek redress. The idea was not implemented immediately and quality of public service deteriorated eroding confidence in public sector.[15]

The recommendation by the Ndegwa Commission to establish the ombudsman was not implemented immediately as some of the state officials opined that such a commission could be used to witch-hunt state officials. Subsequent commissions such as the Waruhiu Committee[16] reiterated the importance of establishing the office of ombudsman as there was little accountability and openness in public servants. Fear by state-official to introduce the office of ombudsman is seen in Sessional Paper no. 10 of 1980[17] highlighted as follows:

> "The Waruhiu Committee has suggested the revival of setting up of the office of the Ombudsman which had been proposed by the 1970/71 Ndegwa Commission. The government rejected the establishment of this office in sessional no. 5 of 1974 on the

[15]Commission on Administrative Justice Kenya website, available at https://www.ombudsman.go.ke/#history, accessed on 4th May 2019.

[16]Civil Service Review Committee *Report 1979-80*, available at http://kenyalaw.org/kl/fileadmin/CommissionReports/Report-of-the-Civil-Service-Review-Committee-1979-1980, accessed on 24th January 2017 at page 143.

[17] Sessional paper no. 10 of 1980 on the acceptance and implementation on the recommendation of the civil service review committee, 1979/80, available at www.knls.ac.ke. accessed on 22/1/2017.

grounds that such office might be misused by unscrupulous elements for witch-hunting and undue victimization. The government still maintains the same views and accordingly rejects the establishment of the office of the ombudsman[18]".

This meant that there was no proper recourse for maladministration. C. Odhiambo Mbai observes that this led to widespread maladministration in public service[19]. The recommendation by the Ndegwa Commission to introduce the ombudsman office was reconsidered in 2007 when the then president appointed the Public Complaints Standing Committee (PCSC) though Gazette Notice No. 5826 of June 2007[20].

Migai Aketch observes that in 2007, Kenya established an office devoted to maladministration to wit the Standing Committee on Public Complaints to address maladministration which office was founded on the concept of good administration and the need to promote good administration in public service [21]. The Committee was however, seen as ineffective owing to factors such as the office has been appointed by the executive and hence its independence could be compromised[22].

[18] Ibid.
[19]C. Odhiambo, 'Public Service Accountability and Governance in Kenya since independence, (2003) *African Journal of Political Science Vol.8 No.1 113* at 143, available at http://pdfproc.lib.msu.edu/?file=/DMC/African%20Journals/pdfs/political%20science/volume8n1/ajps008001006.pdfaccessed on17/1/2017.
[20] Vol. CIX-No. 42-29th June 2007.
[21]Supra n 4 at pg 392.
[22] Ibid.

Commission on Administrative Justice Act 2011 (hereinafter the CAJ Act) establishes the Current Commission in accordance with Article 59 of the Constitution 2010[23].

Above history indicates why the Commission was needed in Kenya. The Commission plays a vital role as a mechanism where citizenry can seek redress for injustices arising from administrative decisions in a quick and efficient manner. This is contrasted with the traditional judicial system which is often seen as slow, costly, and rigorous. Hon. Chief Justice Maraga noted that as at January 2017, there was a backlog of 490,000 cases pending in Kenyan Courts[24]. The large numbers of cases are to be determined by a limited number of judicial officers. Even though there are efforts to increase the number of judges and magistrates the capacity to deal with large number of case is greatly strained.

Another limitation to access to justice though court process is non-justifiability of certain disputes, which creates a barrier to use and access of court process in determining certain disputes[25]. Stephen Owen notes, court proceedings are inappropriate to resolve simple errors which require informal forum to resolve[26]. Stephen further posits that there may be no recourse for the unfair impact of the legitimate exercise of discretion by public administrators[27].

[23] Section 3(1) of the Commission on Administrative Justice Act 2011 in accordance with Article 59 (4) of the Constitution of Kenya 2010.
[24]Flora Koech, "Chief Justice vows to act on case Backlog", *Business Daily 12/1/2017*, available at http://www.businessdailyafrica.com/Chief-Justice-Maraga-vows-to-act-on-case-backlog/539546-3, accessed on 24th January 2017.
[25]Supra n 1.
[26] Ibid.
[27] Ibid.

The Commission therefore serves as a mechanism to give redress to citizen in an informal, speedy manner. This paper examines the Commission on Administrative Justice, the challenges and prospects in improving access to justice in Kenya.

Although the above history highlights the importance of the Office of the Ombudsman in addressing maladministration in public service, the Ombudsman office was not established in Kenya until 2011[28]. Despite the Commission being in existence since 2011, the Commission continues to face limitations in executing its mandate hence hindering its effectiveness. This paper analyses the Commission from a historic perspective, criticizes the approach adopted in establishing the Commission, discusses the challenges facing the commission, for instance, under its current legal framework; the Commission poses a threat to its independence. If the fate of the Commission is subjected to the political decisions and can as well compromise the existence of the commission[29].

Although the Commission was established in 2011, access to appropriate public administration has not been achieved in Kenyan due to maladministration in public service.[30] The Executive and Judiciary have wrong historical perception on the role of the Commission. Public servants have failed to corporate with the Commission, some have challenged the mandate of the Commission whilst investigating malpractices as seen in judicial review case *Republic v Commission on Administrative Justice Ex-Parte National Social Security Fund Board of Trustees [2015] eKLR*[31] which will be discussed further.

[28] Supra n 4
[29] Martin R, 'The Ombudsman in Zambia'. *The Journal of Modern African Studies*, 15(2), pg.239-259.
[30] Supra n 14.
[31] *Republic v Commission on Administrative Justice Ex-Parte National Social Security Fund Board of Trustees [2015] eKLR*, available at http://kenyalaw.org/caselaw/cases/view/111737, (accessed on 24th November 2016).

## 1.1. STATEMENT OF THE PROBLEM

Although the Commission is mandated to address maladministration in public service, Kenyans are yet to achieve good public administration as contemplated in law[32]. The 2015 report by the Commission highlights widespread maladministration and the need to realize good administration in public service[33]. Despite the Commission being in existence since 2011, the Commission continues to face limitations whilst executing its mandate hence hindering its effectiveness.

To this end the problem that this paper examines is why the Commission has been unable to address prevalent maladministration in public service despite its mandate under the law. This paper discusses the challenges facing the Commission. The study scrutinizes the Commission's capacity, independence, resources to carry out its mandate, accessibility, poor cooperation from other state organs, operationalization of Access to Information Act and statutory threat of abolition by Parliament under the Commission on Administrative Justice Act.[34]

## 1.3. JUSTIFICATION OF THE STUDY

Although Kenyans can seek redress through the judicial system, there is prevalent maladministration in public service as the judicial system is not suitable to address the same. This call for an appropriate mechanism where Kenyans can get redress in a fast, efficient and inexpensive forum. Some disputes arising from public administration may not be appropriately addressed through court process. Further, access to justice through court procedures is, rigorous

[32]Commission on Administrative Justice *Annual Report (2014)*, available at http://www.theioi.org/downloads/3ieep/Kenya_OM_Annual%20Report_201 *(accessed on 24th November 2016).*

[33]Commission on Administrative Justice *Annual Report* (2015), available at http://www.ombudsman.go.ke/wp-content/uploads/2015/12/CAJ-Annual-Report, *(accessed on 24th November 2016).*

[34] Commission on Administrative Justice Act No. 23 of 2011.

expensive, cumbersome and may not be available to most Kenyans. Constitutional and law reforms in Kenya seek to address such challenges. This research is vital for policy and decision makers alike. The research will also guide other legal researchers and students in the public administration in research on access to justice in Kenya's and approach to challenges and prospects on the Commission on Administrative Justice.

## 1.4. RESEARCH OBJECTIVES

### 1.4.1. General objective

The general objective of the paper is to evaluate role of ombudsman office in enhancing appropriate public administration, the challenges and prospects in promoting good administration in service delivery. The study will examine the Commission's independence, legal positioning, accessibility, cooperation with other state organs, capacity and resources as hindrance to the Commission in fulfilling its mandate.

### 1.4.2. Specific objectives

a) To discuss the concept of ombudsman in Kenya.

b) To examine the role of the ombudsman in public administration in Kenya.

c) To analyze the challenges facing the Ombudsman Office. Whether it has independence, accessible, capacity, legal positioning, cooperation with other state organs, resources to carry out its mandate and wrong perception of the role of the Commission by the judiciary and executive.

d) To examine lessons from comparative jurisdiction; perspective from South-Africa and Sweden.

## 1.5. RESEARCH QUESTIONS

a) What is the concept of ombudsman in public administration?

b) What is the role of the ombudsman in public administration in Kenya?

c) What are the challenges facing the Ombudsman Office; Does it have independence, accessibility, capacity, legal positioning, cooperation with other state organs, resources to carry out its mandate, and wrong perception of the role of the Commission by the judiciary and executive?

d) What are the prospects for the Office of the Ombudsman Kenya and lessons from comparative jurisdictions of Sweden and South-Africa?

## 1.6. RESEARCH HYPOTHESIS

a) The Office of the Ombudsman in Kenya although reinforced by law, is not achieving its objectives.

b) The Office of the Ombudsman is performing its duties as provided by law. Despite substantive restraints.

## 1.7. LITERATURE REVIEW

This section discuses literature on the concept of the ombudsman in other jurisdictions and in Kenya.

Migai Akech in his Book on Administrative Law discusses the ombudsman and good administration.[35] He argues that the idea of good administration requires a mechanism for addressing grievances arising from maladministration. He notes that traditional administrative

[35]Supra n 4.

remedies such as declaration of rights may be inadequate to deal with administrative errors. He posits that the Commission on Administrative Justice is a useful mechanism for realization of good governance.

Migai Akech highlights some of the advantages of using the office of the ombudsman in contrast with the judicial system. The judicial system is seen to be a formal, bound by precedent, legality approach, slow, expensive and impotent to review administrative action, the ombudsman on the other hand is highlighted as: informal, not bound by precedent, fast and expeditious process[36]. He posits that some of the complaints handled by the Commission would not be suitable, or even capable of resolution in courts of law[37].

Migai's perspective is on good administration and what it entails on effectiveness and efficiency. He argues that the Commission has been vital in enhancing accountability and democratizing public institutions. He argues that the Commission does not have binding powers and should not have binding powers which position has however changed as the Court of Appeal held that the recommendations by the Commission are binding as will be discussed later in this paper as such was not the intention of the statute[38].

Judy Achieng discusses the role of the Commission as an advocate to access to administrative justice in Kenya[39]. Judy observes that the Commission is an avenue of promoting access to administrative justice, effect governmental accountability and an avenue for redressing

[36] Ibid.
[37] Ibid.
[38] Supra n 4.
[39]Judy Achieng Kabillah, *The Office of the Ombudsman as an Advocate of Access to Administrative Justice: Lessons from Kenya (2016)* (LLM theses, University of Nairobi, School of Law).

maladministration[40]. She highlights the vital roles the office of the ombudsman plays as noted by Lorena Gonzaless to the effect that:

> "The ombudsman institution is best placed to ensure accountability in public administration due to its unique characteristics such as not being subject to formalities or legal restrictions for the handling of cases; being an institution that does not charge any fee and being independent of other state bodies"[41].

Judy examines whether the Commission is promoting the access to administrative justice or not by focusing on three aspects of the Commission to wit: accessibility to the public, cooperation/ support by government institutions and the jurisdictions of the Commission. She argues that for the Commission to be effective it has to be accessible to all citizens as the users of public service. She concludes that the Commission is not accessible in terms of physical accessibility and the ease of lodging complains; that owing to insufficient legal framework, the Commission lacks support and cooperation from other government institutions; that the Commission's power is limited to carrying out investigation on complaints and offering advice through advisory opinion[42].

Judy however does not address wrong historical perception by the executive and judiciary on the role of the Commission; limited capacity, legal positioning of the Commission & limited resources to carry out its mandate which aspects are examined under this paper.

[40]Ibid
[41] Supra n 36 at 3.
[42] Ibid.

Kojo Owino examines the challenges facing implementation of administrative justice by the Kenyan ombudsman and states that some of the factors that affecting the enforcement powers of the Commission include: limitations under the law, lack of stable government structures, political patronage, lack of political goodwill, lack of stable government structures and non-corporation by government entities, lack of support by the judiciary[43]. He posits that above factors limits affects its implementation powers as it is unable to secure compliance with its recommendation[44]. This is because the public servants consider the recommendation by the commission as non-binding and hence can easily ignore the same. He recommends that the ombudsman's decision be binding and the ombudsman be given enforcement powers[45].

Amelia Otono examines public complaints and the ombudsman in Kenya and argues that although the Commission is established to resolve public complaints, the Commission faces limitations in faultfinding its mandate[46]. Amelia posits public complaints have traditionally been resolved by the judiciary hence creating conflict with the ombudsman in public complaints resolution. Amelia further finds that the ombudsman is faced with challenges such as statutory limitation on jurisdiction and non-binding nature of the decisions of the commission affecting its effectiveness[47].

The proceeds of the above writing will inform this research on challenges and prospects of the commission. This research will further highlight other challenges that have not been

[43] Owino Kojo, *Challenges Facing Implementation of Administrative Justice by The Kenyan Ombudsman (2019)* (LLM theses, University of Nairobi, School of Law).

[44] Ibid

[45] Ibid

[46] Amelaia J.A Otonoo, *Public Complaints and the ombudsman in kenya, (2018)* (LLM theses, University of Nairobi, School of Law).

[47] Ibid.

addressed as stated on the statement of the problem. This paper will further examine whether the situation prevailing at the time the reaches were done has changed or not.

Linda C. Reif posits that office of the Ombudsman plays an important role by receiving complains on maladministration and aspects conducted in an illegal, unfair and improper manner in Sweden[48]. The investigative role by commission and the friendly approach as compared a rigorous litigation process makes it attractive to the members of the public. Whilst quoting Stephen Owen, Linda notes that court proceedings are inappropriate to resolve simple mistakes and that there may be no legal remedy for the unfair impact of the legitimate exercise of discretion by public administrators[49].

Linda examines several approaches and variations to the ombudsman concept. The approaches connote the manner in which the ombudsman is established. The approaches include: the classical ombudsman, the hybrid ombudsman and the executive ombudsman. The variations on the ombudsman concept connote the jurisdiction. The variations are based on categories such as: the public sector legislative; the public sector executive; the public sector hybrid ombudsman. In brief explanation, the hybrid ombudsman combines human rights, anti-corruption, leadership and code enforcement roles. The public sector legislative or executive ombudsman is limited to a particular issue for instance a single sector[50].

Linda further examines how the approach adopted may hinder the efficiency of the ombudsman. For instance, an executive ombudsman is established by the Executive arm of the

[48]Supra n 1.
[49] Ibid.
[50]Ibid.

government may face interference by the executive and lack independence. This background will assist this research in examining the approach adopted by the Kenyan ombudsman and analyzing whether the approach has contributed to the challenges faced by the Commission in Kenya.

Donald Rowat discussed the introduction of ombudsman in Canada. He noted citizen's rights were interfered with by the government's administrative agencies[51]. He noted that numerous administrative decisions were made some of which we unjust and arbitrary and citizens did not have a forum to seek redress[52]. The above shows the need to establish an institution to give redress on maladministration and administrative injustices. Donald Rowat describes the institution which was to be established as follows:

> "First, the institution was to be set up pursuant to a country's constitution or by a law or by-law of the legislative body, in order to ensure its permanence, neutrality and independence from the administrative organization being complained against; Second, the institution was to receive and investigates complaints from the public against any part of the whole administration at the level of government concerned, though in many schemes it can also start investigations of alleged maladministration on its own initiative; Third, it is an appeal body in the sense that usually it will investigate a complaint only after the complaint has been made to the agency concerned and the complainant is still dissatisfied; Fourth, when it finds a complaint to be justified, it recommends a remedy to the agency and if the recommendation is not accepted it makes its recommendation to the chief executive and in a published report to the legislature but it does not make binding

[51]D. Rowat, "An Ombudsman Scheme for Canada" (1962), *28 Can. J. Econ. & Pol. Sci.*at 253.
[52]Ibid.

decisions and this is what distinguishes it from a court tribunal or arbitrator[53].Professor Donald's research will be a guide to this paper to examine whether the essential elements have been incorporated in the Kenyans Commission on Administrative justice[54]".

Anand Satyanand traces ombudsman concept to Scandinavian states whose ombudsman investigated allegation of maladministration[55]. He states that the Swedish state choose an official called the *justitieombudsman* in 1809. The official was to examine complaints by citizens on maladministration and submit a report to Parliament. According to Anand, the term ombudsman means "grievance representative or entrusted person"[56]. He argues that the office requires an independent person who would make decisions relating to maladministration in a fast expedient way[57].Independence would include institutional, functional and person independence and how it would affect the integrity of the ombudsman.

The proceeds of the above literature are used to in this research paper to evaluate whether the position prevailing then has since changed on challenges facing the Commission. This research paper discusses other challenges such as capacity, independence, accessibility, legal positioning, limited cooperation from other state organs, limited resources to carry out its mandate and wrong perception of the role of the Commission by the judiciary and executive.

[53] Ibid.
[54] Ibid.
[55]Supra n 7.
[56] Ibid.
[57] Ibid

## 1.8. RESEARCH METHODOLOGY

This research uses qualitative data collection and qualitative data analysis, interpretation and discussion of the findings. It is going to be desktop study that shall be an analysis of documentary data. The method that the researcher shall adopt is that of legal documentary analysis secondary data. The primary data shall be the substantive law whereas the secondary data shall be found in peer reviewed journal articles from law journals, texts, case laws and publications.

## 1. 9. THEORETICAL FRAMEWORK

This paper is based on two theories to wit: the theory of specialization in addressing public administration; and the natural law human right theory on inherency of human rights and narrow down to right to fair administrative action and right to access to justice. On the natural law theory every person has a right to fair public administration and right to access to justice under Articles 48 and 47 of the Constitution of Kenya 2010. Ka´ nska, Kexplains on the theory and indicates that every person has the right to these rights which allude to the fact that human beings are born equal in human rights and must be treated with dignity as pronounced in the Universal Declaration of Human Rights of the United Nations(UDHR) in 1948[58]. These rights are inherent to every citizen and are to be enjoyed without any discrimination.

The creation of the Commission is one of mechanism to improve access to justice. The ombudsman office is required to improve access to justice and promote alternative dispute

[58] Ka´ nska, K,'Towards administrative human rights in the EU. Impact of the charter of fundamental rights'(2004)*European Law Journal*, Vol 10(3), pp.296-326 available at https://onlinelibrary.wiley.com>abs accessed on 17/1/2017.

resolution (ADR). Under Section 8(k) of the CAJ Act, the ombudsman, state organs and Human Rights Commission is required observe human rights and freedoms in public organization.[59]

Article 47 of the Constitution 2010 and under the Fair Administration Act[60] mandates state organs to uphold fair administration. It spells out that any administrative decision that affects human rights of an individual or group or legal personality, must be prosecuted and justice must be seen to be done. Further, the law requires that a person affected by any administrative action be supplied with relevant information to enable the person apply for a review or appeal in accordance with section 6.[61] This paper posits that the Commission has a role to play in promoting, protecting the realizing fair public administrative action and to access to justice.

Secondly the theory of specialization is adopted in this paper. Specialized courts on public administration include the use of tribunal systems to settle disputes, offer mediation and make decisions.[62] Specialization addresses the issue of the desirability in the administration of justice. It raises the questions whether there should be specialized tribunals? what would be most desirable in terms of efficiency, speed, true justice, and cost?[63.] This paper responds to these queries by probing the benefits of having ombudsman to resolve maladministration in public administration. The use of tribunals involves adjudicators that are specialized in particular areas of cases brought before it. By doing so, it makes it more accurate to deal with access to justice through the Commission on Administrative Justice.

[59] Supra n 31.
[60] Fair Administrative Act No.4 of 2015.
[61] Section 6(1) of Fair Administration Act No. 4 of 2015.
[62] SH Legomsky, 'Administrative Tribunal, and cross national theory of specialization (1990), *Oxford University Pres,s* Available at philpapers.org/rec/LEGSJC-2, accessed on 21/5/2019.
[63] Ibid.

Legomsky posits that specialized justice focuses on an aspect of justice for instance administrative justice[64]. For the sake of access to justice and efficiency of the judicial system, the office of ombudsman is specialized in public complaints related to public administration, maladministration and administrative justice. Such specialization of justice is found within administrative systems with tribunals, commissions, or specialized government agencies. Each specialized body has qualification and experience in a particular sector of profession. The rationale is to make access to justice effective and efficient to settle disputes in the most coherent way possible and ensure that justice is not only done but must be seen to be done.

The theory of specialization hints at competent jurisdiction. The Commission's jurisdiction over complaints in public administration and maladministration is to facilitate efficiency in access to administrative justice. Bruff HM[65] however notes that, administrative law specialized courts can prove to be expensive and inaccessible to the common public use[66].

Ombudsman as structured in Kenya is meant to be less costly; accessible to the common public; flexible/informal that protects and promotes access to justice. This is contrasted with judiciary which is seen as formal, bound by precedent, strict adherence to procedure, time consuming, costly and increased backlog. Such slow process of pending cases in court may amount to failure in the access to justice criterion. It is therefore, understood that the creation of the Commission in Kenya serves to enhance the access to justice. It is faster, accessible, affordable and simple as compared to the normal court process.

[64] Ibid.
[65]Bruff, H.H, 'Specialized courts in administrative law Admin;, (1991), *University of Colorado* at 329, available at https://scholar.law.colorando.edu/articles/883, accessed on 17/1/2017.
[66]Ibid p.329.

## 1.10. SCOPE AND LIMITATION OF THE STUDY

The scope of this research is to discuss the concept of ombudsman; to discuss the role of the ombudsman in Kenya; to scrutinize the challenges facing the Ombudsman Office; to analyze the perception by the Judiciary and Executive; examine its independence, accessible, capacity, legal positioning, cooperation with other state organs, resources to carry out its mandate.

The study will discuss perspective from Swedish Ombudsman being the Country where the concept of ombudsman began and see the various variation and approaches adopted by Sweden. This paper also examines South African ombudsman being an African country with a progressive ombudsman concept and which has had support from court in performing its mandate. The study analyzes the positive aspects that can be borrowed from the two countries to our jurisdiction with or without modifications.

The scope of this research area and topic is limited by limited resources. Therefore, the research relies on documentary analysis other than field research. It relies on data drawn from both substantive and procedural law, case laws, books, journals, articles, reports and online search as secondary sources of information.

## 1.11. Chapters Breakdown

## 1.11. Introduction: Chapter One:

This study has five chapters. The following is the breakdown of each chapter.

### 1.11.1 Chapter One: Introduction – An introduction to the Study

Chapter one discusses the concept of ombudsman, the background to the study, statement of the problem, research objectives, research questions, hypothesis, literature review, theoretical framework, and limitations.

### 1.11.2 Chapter Two: The role of ombudsman in Kenya

Chapter two examines the roles of the Commission from historical perspective, examines the justification of establishing the ombudsman office, and the current roles, functions and powers of the commission.

### 1.11.3 Chapter Three: Challenges facing the Office of Ombudsman.

Chapter three discusses the challenges facing the Commission to wit: wrong historical perception on role of Commission by judiciary and executive, legislative limitation-threat of abolition by parliament (the legal positioning), whether the Commission has independence, limited capacity, insufficient resources to carry out its mandate; limited corporation from other government agencies, increased litigation, limited accessibility and effectiveness.

### 1.11.4 Chapter Four: Lessons from comparative jurisdiction: perspective from South Africa and Sweden Ombudsman.

Chapter four discusses the South-African Ombudsman, its entrenchment in the Constitution, composition, independence, capacity, accessibility, cooperation with other state

organs and the positive aspects that Kenya can adopt. This chapter also looks at the Sweden Ombudsman, the approach and variations adopted by Sweden Ombudsman and how the same can be used to improve the Kenyan Ombudsman.

### 1.11.5 Chapter Five: Summary and findings.

Chapter five provides for summary and findings of each chapter.

# CHAPTER TWO

## THE ROLE OF THE COMMISSION ON ADMINISTRATIVE JUSTICE IN KENYA

This chapter discusses the roles of the ombudsman from a historical perspective; the various approaches to establishment of ombudsman; justification for establishing the ombudsman in Kenya; and the functions/role and powers of the ombudsman from a historical perspective and as currently established. This section analyses the law, case laws and the reports by the Commission on its roles.

### 2.1 The role of the ombudsman; historical perspective

It is necessary to provide a brief overview on the history of ombudsman in Kenya and the role as it had. It is also imperative to briefly highlight the various approaches to establishment of ombudsman office so as to lay a background on how it affects the role the Commission plays.

Kenya established the office of the Ombudsman in 2007 which was referred as the Public Complaints Standing Committee (PCSC) as a response to complaints in public administration such as maladministration.[67]The Committee was placed under the Ministry of justice, National Cohesion and Constitutional Affairs[68]. Public Complaints Standing Committee had been appointed by the then president vide Gazette Notice No. 5826 of June 2007[69].

At this point it is imperative to note that there are various approaches adopted in establishing ombudsman office namely: the executive ombudsman, the classic ombudsman and the hybrid ombudsman. Different approach has an effect on role and function of ombudsman and

[67] Supra n4 at 398.
[68] Hunnings NM, 'The Ombudsman in Africa' (1966) Vol 10 *Journal of African Law*at 138, available at https://www.cambridge.org>article accessed on 15/4/2019.
[69]Kenya Gazzette, Vol. CIX-No. 42-29th June 2007.

may have an effect on the independence and effectives of the ombudsman. In brief, the approaches are briefly described as follows:

Executive ombudsman is selected by the executive arm of the government and is answerable to the executive[70]. Having been appointed by the executive is questionable whether such can act independently from the appointing authority especially when investigating any complaint against the executive. Linda argues that executive ombudsman can only thrive in a state where there is strong democratic government[71]. Classic ombudsman on the other hand is appointed by Parliament and is answerable to Parliament. Linda describes the Classical Ombudsman as that which has following features[72].

> "First, it is established by the supreme law of the land or any other law enacted by parliament. Second, it is headed by an independent, high-ranking public official who reports to Parliament. Third, the official receives complaints from aggrieved persons and may investigate and recommend appropriate actions. The Official may also act on own instance if the official discovers mal-administration or malpractices. The classic ombudsman has investigatory powers against government departments and entities. The classic ombudsman has strong investigatory powers, to summon officials and give a determination if an official conduct is improper. Its jurisdiction is limited as it does not have jurisdiction over the legislature, police and military forces."[73]

[70] Supra n1 at 14.
[71] Ibid
[72] Ibid
[73] In some jurisdiction such as Netherlands and Sweden, the Ombudsman has jurisdiction over the police and security forces.

Hybrid ombudsman approach combines human rights commission's roles with the roles of the ombudsman and may include powers to handle corruption, leadership, environment complaints[74]. This creates several types of horizontal accountability where several bodies can fight vices such as corruption. The hybrid ombudsman has jurisdiction for complains involving public and private sector.[75]Some have enforcement powers should the relevant state organ fail to remedy a complaint, it has powers to prosecute, refer cases to courts or other tribunals. Such prosecutorial powers are structured to enable the ombudsman effectively fulfill its mandate.

From the above description on the approaches to the office of the ombudsman, it is noted that Public Complaints Standing Committee (PCSC) as then established in Kenya had adopted an executive ombudsman approach. The PCSC was required to receive, examine, and give redress to complaints against public officers on maladministration[76]. Migai notes that PCSC was not effective as it was not accessible, lacked independence and could not be impartial in investigating complaint against the executive being the appointing institution[77]. The current Commission is a successor of the PCSC. In a progressive way the current Commission as established has adopted a classic approach to ombudsman.

## 2.2. Justification of establishing the office of Ombudsman

Before the CAJ was instituted, most government offices were faced with numerous complains in public administration over overt corruption, maladministration, administrative injustices, misconduct and related public administration allegations.[78] It does not mean that now

[74] Supra n 4.
[75] Ibid.
[76] Supra n 4 at 399.
[77] Ibid.
[78]Supra n 30.

there is no such thing as corruption, maladministration, misconduct of public servants, or some illegality committed by the public administration, not at all. What is clear from this research and especially the data analysis is that there is precaution in the public administration.

The Commission's reports show an increase in the number of cases lodged and dealt with as follows: in 2012 the Commission handle 4,062 cases; in 2013 handled 18,257 complaints; in 2014dealt with 79,693 new cases, and 7212 cases arising from the previous year all totaling to 86,905 complaints[79]. In 2015 the Commission addressed 117,936 complaints, 108,920 were complaints lodged in that year and 9,016 complaints which arose in the previous years.[80] According to the report, the natures of complaints handled by the Commission were in relation to lack of response by public servants, delay, unfair treatment, abuse of power and manifest injustice.[81] It is noted that there is an increasing number of Kenyans seeking redress on maladministration, administrative injustices, misconduct and such injustices through the Commission.

The increase in number of people seeking redress through the Commission gives a positive indication on the vital role that the Commission is playing in promoting access to justice and offering redress for complaints arising from public administration. Migai observes that some public servants are responsive to the issues raised by the Commission while some are corporative in implementing the Commission's recommendations[82]. Migai captures the realization by public administrators not to be cited by the Commission and be declared as unfit for public service[83].

[79] Supra n 29
[80]Supra n 30.
[81] Ibid.
[82] Supra note 4 at 406.
[83] Ibid.

Migai further notes that the Commission contributes to the realization of good administration through the government performance contracting program in public service[84].

Migai posits that the performance contracting program contains matrix that specifies the weight attached to a number of performance criteria[85]. Public institutions such as Ministries, Departments and Agencies (MDA) are evaluated based on several factors which include: establishing a complaints handling mechanism, implementation of the recommendations of the Commission. He posits that the Commission has power to punish such institutions that fail to respond to its queries, or implement its recommendations. He concludes that indeed MDA's tend to comply with the Commission's recommendations[86]. This implies that members of public have a mechanism where they can seek redress for complains arising from public administration, maladministration, administrative injustices, misconduct and such other relates injustices. This creates confidence to the members of the public that there is an institution to hold public officers accountable.

Numerous cases of maladministration, administrative injustices, misconduct have successfully been dealt with. For instance, in 2015 the Commission's report indicates that the Commission dealt with 117,936 consisting of 108,920 complaints lodged in 2015 and 9,016 arising from complaints lodged in 2014[87].

Another justification for having Ombudsman in Kenya is to operationalize the access to justice principle, promote fair administrative action, operationalize right to access to

[84] Ibid.
[85] Supra note 4 at 406.
[86] Ibid.
[87] Supra n 30.

information[88]. The Commission plays a vital role in operationalizing the above rights through its functions, role and powers.

The idea of good administration requires a mechanism for addressing grievances arising from maladministration. Migai notes that traditional administrative remedies such as declaration of rights may be inadequate to deal with administrative errors[89] . He posits that the ombudsman concept is a useful mechanism for realization of good governance[90]. Indeed, the ombudsman institution is best placed to ensure accountability in public administration due to its unique approach, using informal approach in dispute resolution, not having to adhere to strict legal procedure /restrictions, not charging amongst others.

The Commission is an alternative route to access to justice without necessarily using the court litigation process. Whilst seeking redress through court, one is likely to face challenges such as costly litigation due to expenses incurred in filing a suit, hiring of an advocate and delays in determination of court cases due to among other case backlog.[91]The large numbers of cases are to be determined by a limited number of judicial officers. Even though there are efforts to increase the number of Judges and Magistrates, the capacity to deal with large number of case is greatly strained. Seeking redress though court process may also be hindered by non-justiciability of certain disputes in which case judicial settlement will be unsuitable or an unrealistic option.[92].

[88] Articles 35, 47 and 48 of the Constitution of Kenya of Kenya 2010.
[89]Supra n 4.
[90] Ibid.
[91]Supra n 22. Hon. Chief Justice Maraga stated that there is a backlog of 490,000 cases pending in Kenyan courts.
[92] Supra n 1 at 15.

Donald Rowat discusses the need to establish office of the ombudsman in Canada[93]. He noted that citizen's rights were infringed by the government's administrative machine[94]. He noted that citizens needed a forum to address arbitrary administrative decision hence establishment of Ombudsman in Canada[95]. On this backdrop, the section below discusses the roles, functions and powers of the Commission.

## 2.3 Role, functions and powers of the Commission on Administrative Justice.

This section discusses establishment, composition, roles and powers of Commission as provided for under the Constitution 2010 and various legislations. It interrogates case laws and reports by the Commission on its functions and powers.

The Constitution 2010 establishes the Kenya National Human Rights and Equality Commission (KNHREC), requires the Parliament to enact legislation to give full effect of the Article 59 and enact any such legislation to restructure KNHREC into two or more separate commissions[96]. In 2011, Parliament established three commissions vide their respective statutes namely: Commission on Administrative Justice Act, (hereinafter the CAJ Act)[97], the National Gender and Equality Commission[98] and the Kenya National Commission on Human Rights[99].

This paper focuses on Commission on Administrative Justice. In terms of composition, chairperson is the ombudsman and has two other members to constitute commission[100]. The CAJ Act has provided for six year period of service for the chairperson and two members of the

[93] Supra n 8.
[94] Ibid.
[95] Ibid.
[96] Article 59 (4) of the Constitution of Kenya of Kenya 2010.
[97] Supra n 31 at Section 3.
[98] National Gender and Equality Commission Act no 15 of 2011.
[99] Kenya National Commission on Human Rights Act No. 14 of 2011.
[100] Supra n 36 at 35.

Commission[101]. The CAJ Act sets out the process of appointment into office and how they can be removed.[102] Unlike the PCSC as previously established, the current Commissioners are appointed through an elaborate process, with a selection panel, the nominee have to be approved by the National Assembly and has to report to Parliament[103]. The approach adopted therefore is the classical approach to the ombudsman which reduces interference by the Executive.

Even though the ombudsman consists of one chairman and two members, the Commission tasked with enormous responsibilities. This is against a background of prevalent maladministration in public service. Judy Achieng observed of the prevalence of maladministration in public service delivery in Kenya which calls for an appropriate mechanism where Kenyans can get redress in a fast, efficient and inexpensive forum[104]. This would call for a Commission which has the capacity and resources to curb the prevalent maladministration. This paper proposes that there're be an increase in the number of Commissioners in the Commission to seven enable the Commission fulfil its mandate.

Section 8 of the CAJ Act states the functions of Commission[105]. Migai highlights the main functions of the Commission to be: to investigate prejudicial and improper conduct, investigate maladministration, facilitating establishment of complaint handling mechanism, promoting alternative dispute resolutions and recommending remedies for maladministration[106]. In defining what constitutes maladministration, he cites *R – Local Commissioners for Administration for North and East Area of England, Ex-parte Bradford Metro Politan*

[101] Supra n 31 at Section 14.
[102]Supra n 31 at Section 16.
[103]Supra n 31 at Section 11.
[104] Supra n. 36.
[105]Section 8 of the Commission on Administrative Justice Act 2011.
[106]Supra n 4 at 399.

*Council*[107], where maladministration is deemed to be faulty administration such inefficient, improper management of affairs, especially public affairs[108].

George Githinji highlights the function of the ombudsman[109]. The scope of the Commission's work include: handling maladministration; handling administrative injustices such as misconduct, integrity issues; providing advisory opinion, recommending appropriate remedies, developing capacity in government, promoting alternative dispute resolution, and promoting special rights[110]. He elaborates that maladministration includes poor services, lack of action, survive delay, incompetence amongst other. Administration injustices connotes: adverse actions taken or not taken by the Public Servants. Improper conduct includes: abuse of power and misbehavior in the public service[111].

The jurisdiction of Kenyan ombudsman is derived from the Constitution, CAJ Act, Access to Justice Act. The Commission deals with public complaints arising from public administration related to maladministration, administrative injustice, misconduct[112]. This may arise from administrative actions, from decisions or actions carried out in the public service[113]. It noted that ombudsman concept came with anecdotes on access to justice, natural justice, human rights and the rule of law. The Commission is seen to promote access to justice as well as enhance fair administration action[114]. The Commission is also seen as a specialized institution to

[107] *[1979] 2 All ER 881*, available at https://global.oup.com>law>student accessed on 11/6/2019.'
[108] Supra n. 4 at 395.
[109] George Githinji, 'Office of the Ombudsman' (2019), available at https://www.afrocave.com/office-of-the-ombudsman-in-kenya/ accessed on 11th June 2019.
[110] Ibid.
[111] Ibid.
[112] Section 2 of Commission on Administrative Justice Act, No 23 of 2011.
[113] Ibid.
[114] See Articles 47 and 48 of the Constitution of Kenya 2010.

deal with maladministration since some claims could not be addressed using the judicial system as it exists due to various factors.

According to Migai, the conceptualization of the role of ombudsman office is explained under the meaning of good governance versus maladministration.[115] Ms Judy as well echoes similar sentiment while discussing ombudsman as an advocate for access to administrative justice.[116]. The same argument can be sustained under Articles 47, 48 and 59 of the Constitution of 2010[117].

This paper will discuss the following key duties of the Commission: investigatory, setting up a complaint handling mechanism, regulatory, policy making, advisory opinion, reporting, public awareness and operationalizing the access to information.

The first function of the Commission is to investigate allegations on maladministration and administrative injustices. The Constitutional provision on investigatory role of the Commission can be derived from article 59 (i) (j) and (k). The Commission can probe complaints relating to power abuse, administrative injustice, delay, unfair/oppressive conduct, unlawful treatment, unfair and unresponsive public officials. The CAJ Act provides that the Commission can: "investigate any conduct in state affairs, or any act or omission in public administration by any State organ, State or public officer in National and County Governments that is alleged or suspected to be prejudicial or improper or is likely to result in any impropriety or prejudice[118].

[115]Supra n.4 at 391.
[116] Supra n. 36 at .39.
[117]Supra n 4 pg. 399.
[118] Section 8 (A) of Commission on Administrative Justice Act, No 23 of 2011.

The CAJ Act further empowers the Commission to probe administrative actions, including actions or decisions made in public service[119]. These covers wide range of complaints such as: impropriety, prejudice, unfairness, arbitrariness, administrative errors, abuse of power, inefficiency, oppressive, manifest injustice, unresponsive officials, discourtesy, incompetence, maladministration, partiality, unreasonable delay and administrative injustice within the public service.

The investigation can be done upon receipt of a complaint or on its own motion[120]. Once the Commission receives a complaint, it will assess if the complaint is admissible and sieve if the complaint is frivolous, vexatious or in bad faith[121]. Migai observes that whilst investigating, the Commission has power to issue summons, administer or require statements to be given under oaths[122]. The Commission can requisition for documents and compel the production of such documents or compel the attendance of any person who fails to respond to appear before the commission[123].

In investigating public institutions, the Commissions is able to unearth maladministration in public institution. This however has been met with resistance by public servants. This led to the Commission's investigatory role been challenged in court in *Republic v Commission Ex-Parte National Social Security Fund Board of Trustees.*[124] The Commission had investigated and made a report on breach of procurement procedures by the acting CEO and the Management of National Social Security Fund Board (NSSF) in the awarding of Tassia II Infrastructure

[119] Section 2 of the Commission on Administrative Justice Act, No 23 of 2011.
[120] Section 29 (1) of the Commission on Administrative Justice Act, No 23 of 2011.
[121] Section 34 (b) of the Commission on Administrative Justice Act, No 23 of 2011.
[122] Supra n 4.
[123] Supra n. 4 at 400.
[124] Supra n 28.

Development Project (April, 2014). NSSF Board of Trustees the *ex-parte* Applicant sought to quash the report by the Commission vide judicial review. The *ex-parte* Applicant contended that the Commission did not have jurisdiction to investigate the allegation on misappropriation by the *ex-parte* Applicant and hence the investigation report was a nullity in law for want of jurisdiction. The Applicant prayed that the court to declare the report a nullity to avoid substantial prejudice and inconvenience that may ensue from acting on the recommendations.

The Applicant contended that the issue investigated in the report fell in the jurisdiction of Ethics and Anti-Corruption Court and that the Public Interest Committee (PIC) was also investigating the matter. The Commission in response stated that it had wide mandate under Articles 59(2) (h)–(k), 249 and 252 of the Constitution as read together with Sections 8, 26, 27, 28 and 29 of CAJ Act and could therefore investigate claim of abuse of power by the Applicant's management. No other entity was seized of investigations in respect of the matters raised by the Respondent as at the time of the commencement of the inquiry. Further, that PIC and Ethics and Anti-Corruption Commission (EACC) commenced their investigations after the Commission had initiated its inquiry as was evidenced by the correspondence and minutes exhibited through the Applicant's verifying affidavit.

In addition, it was the Commission's argument that its investigations focused solely on administrative law through investigation on mal-administration (abuse of power, impropriety or prejudice) pursuant to its distinct mandate in the Constitution, quite apart from the investigations of any other body, a fact that was confirmed by EACC in the letter dated 21st February, 2014. Further that the resultant actions on the Commission's investigations were distinct from that of any other investigations and there was indeed no conflicting recommendation between its recommendations and those of PIC.

The Court upheld that the Commission had jurisdiction to investigate and make the report as at the time the Commission initiated its investigations, no other body had commenced investigations. The above decision affirms the investigatory role of the Commission. Even though the CAJ Act provides for investigatory power, the question that arises is; can ombudsman in own motion or upon receipt of a complaint initiate an investigation on maladministration or administrative injustices in the office of the president. These are some of the challenges that will be discussed in chapter three of this paper.

The Second function of the Commission is to set up mechanism to handle complaints in public service sectors[125]. This is to provide to the members of the public a forum and mechanism of raising and resolving complaints relating to public service maladministration. The Commission lobbied for enactment of the Commission on Administrative Justice 2013 regulations to operationalize the complaint handling mechanism. Unlike the formal judicial system, the complaint mechanism has adopted an informal complaint system where complaints are handed without a strict adherence to rules of procedure.

In terms of procedure, the regulation defines admission as assessment of a complaint to determine if its eligible. The regulation provides for a model on how to lodge complaints, parties to a complaint, forms of complaint, principles of natural justice, process and service, screening, admissibility and discontinuation procedures of such complaints. If dissatisfied a party can appeal and withdraw a complaint. Complaints can lapse or be discontinued by the commission. The Commission has a register of complaints under custody of the Commission.

[125]Section 8(e) of the Commission on Administrative Justice Act, No 23 of 2011.

Upon admission of a complaint, the Commission will inform the respondent, who is required to respond to the claim within a certain time frame. In instances where the respondent fails to respond, the Commission can take several actions including making a decision on the dispute; suing the respondent; citing as unresponsive state or public officer; and taking actions through the performance contracting programs[126].

In terms of dispute resolution mechanism, the Commission is obligated to use alternative dispute resolution methods in collaboration with other government offices[127]. Migai posits that in resolving a complaint, the Commission may conduct investigations, or conduct an enquiry, resort to alternative dispute resolution or conduct a hearing[128].

The third function of the Commission is regulatory and policy making. The ombudsman can make policy statements and advise other state organs and government institutions on certain policy issues/frameworks with a view of improving public administration. This is seen in the Commission Report 2015 and 2016 where Commission had issued five advisory opinions on diverse issues affecting county and national governments and on matter of public importance. Apart from the Constitution and the CAJ Act, there are other legislations which give powers to the Commission i.e the Access to Information Act[129] and the Public Office Ethics Act[130]. The

[126] Supra n 4.
[127] Section 8 (f) of the Commission on Administrative Justice Act, No 23 of 2011.
[128] Supra note 4 at 402.
[129] Access to Information Act No. 31 of 2016.
[130] Public Office Ethics Act No. 4 of 2003 Section 41.

two legislations further support the role of ombudsman and operationalize the mandate, functions and make the role effective.[131]

The fourth function of the Commission is to operationalize the Access to Information Act (hereinafter the Act). Access to Information Act aims at giving effect to the right to access information to citizens as provided under the Constitution[132]. The Act empowers the Commission investigate and report public officials who refuses to give information as allowed under the Act[133]. The Act allows the Commission to request for information; develop policies on accessing information; gives an oversight role to the Commission in enforcement of the Act.

The above role of the Commission is operationalized vide the procedure provided for under the Commission on Administrative Justice Regulations of 2013.[134] In terms of procedure, the regulation defines admission as assessing a complaint to determine its eligibility. The regulation provides for a model on how to lodge complaints, parties to a complaint, forms of complaint, principles of natural justice, process and service, screening, admissibility and discontinuation procedures of such complaints. A party can appeal and withdraw a complaint. Complaints can lapse or be discontinued by the commission. The Commission has a register of complaints under custody of the Commission[135].

Upon admission of a complaint, the Commission will inform the respondent, who is required to respond to the claim within a certain time frame. In instances where the respondent

[131] Ontita, E.,' Governance and Social Protection: A Case of the Constitution Kenya 2010 as an Instrument for Social Protection. Public Policy and Administration', (2018) 6(2), at 19-27.
[132] Article 35 of the Constitution of Kenya 2010.
[133] Sections 24 and 26 of the Access to Information Act No 31 of 2016.
[134] Legal Notice No. 64/2013.
[135]Regulation 16 of Commission on Administrative Justice Regulation 2013.

fails to respond, the Commission can take several actions including deciding on a dispute; suing the respondent; citing the respondent as unresponsive state or public officer; taking actions through the performance contracting programs[136]. The Access to information Act adopts the complaint resolution procedure similar to the one stipulated under the Commission on Administrative Justice Regulations.

The fifth function of the Commission is to make decision on complaints lodged. Upon hearing the complaint, the Commission is required to render its decision to the parties on the outcome of the process. The Court of Appeal has recently held that the Commission's decisions are binding and therefore state officers cannot just ignore the decision by the Commission as will be discussed latter in this paper.

The sixth function of the Commission is to report to the National Assembly twice an year on the grievances considered and remedies prescribed. This implies that a classical approach to establishing the Commission was adopted where the Commission reports to the Parliament rather than the executive like its predecessor. It can be argued that in such an approach, the executive cannot interfere with the Commission in executing its mandate. However, The Commission's existence, independence and capacity may be interfered with by the parliament. This arises from Section 55 of the CAJ Act which allows Parliament to review the Commission with a view to merging it with the Human Rights Commission upon the expiry of five years of the date of commencement of the Act[137]. Noting that the commencement date is 5th September 2011, this poses the threat of having the Commission terminated or amalgamated with the Kenya National Commission on Human Rights.

[136] Regulations 18 Commission on Administrative Justice Regulation 2013.
[137] Section 55 of the Commission on Administrative Justice.

Through the reporting system, the CAJ Act avails a possible window for the Commission to present periodical reports to National Assembly, make policy statements, conduct research, advise the Executive on matters dealing with administrative justice in Kenya, influence change and public opinion on the public administration[138].

The Commission has a role to play in conjunction with other government agencies. It requires commitment and political good will from public officers and the service consumers.[139] The Commission further requires support from the judiciary. Whereas some judicial officers have upheld the mandate of the Commission; other judicial officers have adopted a narrow positivist approach hence limiting the mandate of the Commission. This is seen in *Republic v Commission Ex-Parte National Social Security Fund Board of Trustees*[140]as discussed above.

The seventh function of the Commission is to conduct public awareness sessions on issues pertaining administrative justice. This is seen in 2016 report training public officials on various aspects of public administration and in line with the performance contacting agreements where state agencies are required to establish a mechanism for dispute resolution as well as ensure compliance with the recommendation of the Commission. The Commission is also involved in community public education and advocacy.

The eighth function is to make appropriate recommendations on dispute lodged. The remedy prescribed depends on the complaint and Commission has power to recommend

[138] See Commission on Administrative Act generally.
[139]Supra n 29.
[140] Supra n 28.

compensation. This was done in the *ex-parte Engineer Judah Abekah*[141]. The Commission can also recommend other appropriate measure depending on the complaint lodged. This is in realization that some remedies may not be available through court process and some claims may be non-justiciable. Migai Aketch observes that compensation may not be available in judicial review, even when a person has suffered due to maladministration[142]. He also posits that in certain instances an aggrieved person may only require an apology from the concerned government institution which remedy is not available in judicial review proceedings.

As noted in the reports in the literature review, prevalent maladministration was the reason why Kenya needed an ombudsman to provide transitional justice mechanism that should bring change in the public order. The Ombudsman Office Kenya play a vital role in dealing with maladministration, administrative injustice, misconduct and such other related injustices which had been prevalent is public service delivery. This is done through the roles above. The office further plays a vital role in operationalizing access to information right, access to justice and fair administrative right. This is however not without challenges as will be discussed in next chapter on challenges and prospects.

[141] *R –vs- Kenya Vision 2030 Delivery Board and another ex-parte Engineer Judah Abekah (2015) eKLR*. Available at http://kenyalaw.org/caselaw/case/view/106164, (accessed on 17/1/2917).
[142] Supra n 4.

# CHAPTER THREE

## CHALLENGES FACING THE COMMISSION ON ADMINISTRATIVE JUSTICE

Chapter three discusses the challenges facing the Commission: whether the Commission has the capacity, whether the Commission is independent, whether it has resources to carry out its mandate; whether the Commission as established can easily be abolished; whether the approach adopted in establishing the Commission hinders its efficiency; whether the Commission is accessible, whether the commission has requisite jurisdiction and powers to enforce its decision; and whether the commission has the necessary factors that enhance effectives of the Commission.

As a precursor to the challenges facing the Commission it is imperative to briefly highlight some of the factors necessary for the effectives of the ombudsman and how such factors relate to the challenges facing the Commission. There are essential elements that promote the effectiveness of the office of the ombudsman in improving public administration and protecting human rights. Linda C. Reif states these factors to include: self-rule, defined jurisdiction, enough powers, accessibility, collaboration, operational efficiency and accountability[143]. The essential factors are briefly discussed as below:

Independence of the Commission is a crucial factor which connotes institutional, functional and personal independence[144]. The way on how ombudsman is appointed should give the office self-control from executive arm of the government. The ombudsman ought to be appointed by the parliament rather than by an presidential decree. The ombudsman is to be accountable to the legislature rather than the executive. Independence of the ombudsman is also

[143]Supra n1 at 396.
[144]Ibid.

enhanced by securing security of tenure, allowing the ombudsman to make budget, hire their personnel, protection from civil and criminal suit for actions done in the proper exercise of its duties[145] .

The authority of the ombudsman should be well described to enable it accomplish its mandate and to avoid conflict of jurisdictional mandate with other institutions. For instance, hybrid ombudsman have mandate over public sectors and private sector, whilst executive ombudsman has jurisdiction over public sector[146].

Accessibility of the commission is a crucial factor. It entails: the physical accessibility by the population; public knowledge of the existence of the ombudsman and its functions; ease of lodging a complaint; real access to the services offered by ombudsman. In Kenya, ombudsman has offices in Nairobi, Mombasa, Kisumu and Bungoma and there have been efforts to increase accessibility of the ombudsman by having stations at Huduma Centre. The[147]. This however is not adequate as majority of the counties are not covered.

Accountability and transparency are an important factor. This is done through the reporting system. In some jurisdictions, the office of the ombudsman reports to the executive which has been criticized as likely to interfere with the independence of the institution. Linda C. Reif argues that independence of the ombudsman can be intense through appointment by the parliament and reporting to the legislature rather than executive[148].

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[145] Supra n 1.
[146]Supra n1 at 401.
[147] The Commission on Administrative Justice *Annual Report*(2016), available at https://www.ombudsman.go.ke, accessed on 25/6/19.
[148] Supra n 1 at 397.

Additional indicators necessary for the effectiveness of the ombudsman are: popular governance in the state; self-control of the institution from the state; jurisdiction of the institution; extend and enough authority given to the institution; accessibility of the office to the members of the public; the level of cooperation of the institution with other bodies; operational efficiency including (level of financial and human resources; accountability and transparency of the institution; the behavior of the government in politicizing the institution and having a receptive attitude towards its activities and the credibility of the office in the eyes of the populace[149].

## 3.1 Challenges facing the Commission on Administrative Justice

On the above background this section below discusses the challenges facing the Commission and whether the necessary factors have been incorporated in establishing the Commission.

### 3.1.1 Legislative limitation-threat of abolition by Parliament.

Section 55 of the CAJ Act allows Parliament, upon expiry of five years, to review the Ombudsman with a view of consolidating it with the Commission in charge of human rights.[150] The CAJ Act came into force on 5th September 2011, this mean that parliament can easily abolish the Commission. This would be detrimental for the following reasons first; the Commission is seen as a specialized tribunal to handle maladministration and administrative injustices. Legomsky argues that specialized courts on administrative justice include the use of tribunal systems to settle disputes and offer mediation and make decisions.[151] Specialized justice

[149] Ibid.
[150] Supra n 31.
[151] Supra n 52.

addresses the question of the desirability of specialization in the administration of justice. Abolishing the Commission upon the expiry of five years would therefore negate the benefits of specialization of the Commission.

Secondly, the Commission as established under the CAJ Act can easily be abolished by the Parliament. The Commission lacks the benefits of constitutionally established commission which cannot be easily abolished by the parliament and would require a referendum to be abolished. For instance, the Constitution 2010 established independent offices such as the Controller of Budget, Auditor General and the Salaries and Remuneration Commission and parliament cannot easily abolish such constitutionally established commissions even when such a Commission is at loggerhead with the Parliament as recently witnessed between the Parliament and the Salaries and Remuneration Commission.

The above position is compared to the South Africa ombudsman (Pubic Protector) and Swedish Ombudsmen that are entrenched in their Constitution. The Public Protector positioning in the legal framework is in the Constitution which implies that the institution's independence and permanence is underlined[152]. The constitutional amendment process is specifically designed so as to prevent frequent amendments by the parliament, executive and any other body. By integrating the institution of the Public Protector into the Constitution, which is the supreme law of the land, the permanence of the institution is underlined since any constitutional amendment is subject to strict conditions[153].

[152]Katharina G Ruppel-Schlichting, 'The independence of the Ombudsman in Namibia, *African Online Journal* available at
https://www.kas.de › namibia › Independence_Judiciary › ruppel-schlichting, accessed on 3/9/2019.

[153]Ibid.

Katharina posits that such entrenchment in the constitution enables stability for the office and provides integrity to it in terms of the public's perceptions[154]. Thus, the Ombudsman freely investigates care without fear on interference from other arms of the government. Entrenchment in the constitution makes it hard for the Parliament or Executive to interfere with a constitutionally established institution. It is therefore important that there be amendment in Kenya.

The legal positioning of the Public Protector is compared to the Kenyan Commission which as established under the CAJ Act and can easily be abolished by the Parliament. The Commission lacks the benefits of constitutionally established institution which cannot be easily abolished by the Parliament or Executive and would require adherence to strict provision of law to be abolished.

### 3. 2 Independence

Katharina G Ruppel-Schlichting whilst discussing self-control of Ombudsman in Namibia posits that self-control could be the most basic and indispensable value for the success of the office[155]. Katharina argues that independence to be a state of self-control from people or things[156]. The principle ground for independence in this context is that an Ombudsman able to handle its activities with credibility to both complainants and the authorities that may be reviewed by the Office of the Ombudsman[157].

[154]Ibid
[155] Ibid.
[156]Ibid.
[157]United Nations Development Programme. 2006. Guide for Ombudsman institutions: How to conduct investigations. Bratislava: UNDP, at p 12 available at https://www.eurasia.undp.org>library accessed on 12/6/2019.

Independence also connotes institutional, functional and personal independence Osting argues that the manner in which the ombudsman is appointed should give the office independence from influence or control from executive arm of the government[158]. The ombudsman ought to be appointed by the legislature rather than by an executive decree. The ombudsman is to be accountable to the legislature rather than the executive. Independence of the ombudsman is also enhanced by securing security of tenure, allowing the ombudsman to make budget, hire their personnel, immunity from civil and criminal suit for actions done in the proper exercise of its duties[159].

Independence is further construed to mean that ombudsman should not take orders from any other arms of government to avoid being manipulated by other government offices. The rationale is to render such offices independent from pressures and external forces. The objective is to make such offices impartial, objective and accurate in their services. It builds more confidence and credibility in the institution. Ombudsperson office should enjoy confidence from the public that it serves. The ombudsman office as established is not independent as parliament can easily abolish the Commission.

Fundamental argument of independence should not mean that the Commission should not be accountable to Parliament or any other arm of government. Ombudsman must be oversighted, be subjected to law and cannot abuse office or be biased while dealing with complaints and parties. Traditionally, in Sweden, the Ombudsman was an extension of parliament to replace the former existing post known as Chancellor of justice.[160]There is no problem with this practice.

[158] Supra n 129.
[159] Supra.
[160]Supra n 59.

However, ombudsman office spreading out from its original context may require some adaptability and adjustment. The reason for such adjustment is based on the nature of politics and socio-economic realities that vary from one jurisdiction to the other. For instance, the level of administrative injustices in Kenya or abuse of office and power may not be the same in Sweden and Finland or, in Denmark. It would not therefore advisable, for Kenya to replicate the same concept of ombudsman in developed democracies.

Hunnings in his article on Ombudsman in Africa questions the independence of the ombudsman in Africa when Parliament is weak or non-existent?[161]. The apprehension being that legislators can conspire to frustrate ombudsman and even reduce budget allocations to impede the work of the office.

In the Kenyan context, the manner in which the Chairman and the Commissioners are appointed has improved. Unlike the previous regime of Public Complaints Service Commission where the president could appoint the ombudsman, the current Commissioners are appointed by a panel and are approved by the parliament[162]. This enhances their person independent and the Commissioners can investigate the executive independently. The Commissioners are also protected from prosecution for actions done fairly and in the line of duty.

Even though the Commission has the authority to come up with its budget, the independent and performance of the ombudsman can be hindered by the parliament through budget allocation. Judy Achieng posits that the Commission is mandated to investigate on its

[161]Ibid
[162] Section 11 of the Commission on Administrative Act no 23 of 2011.

own motion under article 252 (a) of the Constitution 2010[163]. Judy however obverses that owing to resource intense nature of such process, the Commission is unable to conduct such investigation due to financial constrain and budget limitation by parliament[164]. The Commission's independence and existence is also threatened by the Section 55 of the CAJ Act which allows parliament to consider amalgamating the Ombudsman with the Commission responsible for Human Rights which would in effect abolish the Ombudsman.

From the foregoing, independence can be seen as a multifaceted aspect. These include the legal position of the ombudsman, to whom is the ombudsman accountable to; how the ombudsperson is appointed and removed from office; how its funded; what mechanisms it has to enforce its decision and the investigation process.

### 3.3 Limited Organizational Capacity

Understanding the organizational capacity challenge[165] connotes the optimization of service the Commission is expected to offer.[166] It is noted that access to administrative justice concerns itself with interaction between effective public administration and individual right to fair administrative action.[167] Judy whist quoting Benon Basheka observes that " the public service is the main function of any government as it controls all opeartions, maintenance and servicing of service delivery infrastructure…"[168]. Public service delivery is expansive and would

[163] Supra n 36 at 57.
[164] Supra.
[165] https://www.google.co.ke/search?q=size+capacity+challenge&ei=3zz3XNbFKo3DlwS2xY-gBg&start=10&sa=N&ved=0ahUKEwiWsfHkuNHiAhWN4YUKHbbiA2QQ8tMDCHg&biw=1366&bih=635 Accessed on 5th June 2019.
[166] Linda Smircich, and Stubbart, C., 'Strategic management in an enacted world (1895)'. *Academy of management Review* at 724, available at https://www.jstor.org/stable/258041accessed on 12/6/2019.
[167] Supra n 36 at 45.
[168] Supra n 36 at 46.

require public servants to be held answerable. This calls for a mechanism that promotes good administration and appropriate forum for redress for maladministration's and administrative injustices.

It has been observed in the Commission's report[169] of the wide spread maladministration's and administrative injustices in the public service. Section 9 of the CAJ Act[170] provides for 3 members one chairperson and two other members[171]. Rationalizing the relationship between 3 Commissioners to serve a population of 45,000,000 in a country with widespread maladministration is problematic.[172] Given the magnitude of the statutory functions under Section 8 of the Act[173], it would be reasonable to suggest a commission of between 7-9 members. This will allow the Commission to have sub-committees to handle particular complaints, and develop policy framework and make recommendations on particular issues.

The Commission has a secretariat to facilitate in its mandate. Even then insufficient human capacity is highlighted in the 2015 Report where the commission complains of inadequate staffing[174]. The Commission decried that it had a 70-member staff yet the approved staff establishment is 336. This created a strain on the staff which affects the fruitful delivery of services to the citizens and narrows the services of the Commision[175].

[169] See generally 2015 and 2016 Reports by the Commission on Administrative Justice.
[170] Section 9 of Commission on Administrative Justice Act, No. 23 of 2011.
[171] Supra n 36.
[172] Supra n 22.
[173] Supra n 22.
[174]Supra n 15 at 86.
[175] Ibid.

### 3.4 Insufficiency of resources

Anchored on the numerical consideration of members, the next concern shall regard the sufficiency, efficiency and effectiveness of the Commission[176]. This is conceived in line with input versus output. More resources shall improve the capacity of the commission. An enhanced Commission shall then generate better and sufficient output. Even though the Commission has the power to come up with its budget, the performance of the ombudsman can be hindered by the parliament through budget allocation. The Commission is mandated to investigate on its own motion under article 252 (a) of the Constitution 2010. Judy however obverses that owing to resource intense nature of such process, the Commission is unable to conduct such investigation due to financial constrain and budget limitation by parliament[177]. Migai Aketch observes that in terms of methodology, the commission adopts an inquisitorial approach where the decision maker identifies the issues, gathers evidence and control the process[178].This would call for resources to enable the Commission perform its mandate.

It is correct to argue that giving so many functions to the Commission and limiting the funding is like denying the Commission the possibility of implementing its objectives sufficiently and effectively[179]. In a claw-back style, the legislature gives powers to the Commission through legislation but denies it the access to sufficient resources.[180] This is highlighted in the Commissions 2016 Report[181], the Commission had been allocated Kshs 480,710,920 however the amount was downsized by Kshs 15, 890, 920. The downsized allocation limited the Commissions from undertaking key activities such as outreach, advocacy

[176] Supra n 151.
[177] Supra n 36 at 57.
[178] Supra n 4.
[179] Section 8 of the Commission on Administrative Justice Act No. 23 of 2011.
[180] Supra.
[181] Supra n 132.

and decentralization of services and offices. The Commission decried that one of the main challenges being low budgetary ceiling and late disbursements.[182] The Commission decried that low budget allocation hinders its overseeing good governance mandate both national and county levels. The limited finances results to an overstrained human resource, limited infrastructure and hinders decentralization to counties[183]

The low budgetary allocation is also reflected in the 2015 Annual report where the Commission reports that "the Exchequer allocates in adequate funds unable to meet the financial demands of the Commission despite the fact that there is significant increment of complaints which has pushed Institutional limit beyond its ability. Due to the inadequate budgetary limit, the Commission has only 10 outlets apart from the four main offices based in Nairobi, Mombasa, Kisuma and Eldoret. The services of the commission can however be accessed through the 11 Huduma Centers spread across the Country."[184]. Consequently, the financial capacity of the Commission may rely on the users. The Commission may charge a fee to meet the budgetary needs that shall interfere with the access to administrative justice. This negates the concept that the Commission should be cheap and accessible unlike other formal court proceedings.

### 3.5 Poor co-operation by government agencies and limited enforcement mechanism

The Commission mandate includes dealing with maladministration, administrative injustices and promoting good administration. Migai Aketch[185] observes that one of the mechanisms of promoting administrative justice in public institutions is through Government

[182] Supra n 132 at 11.
[183] Supra n 132 at 70.
[184] Supra n 132 at 85.
[185] Supra n 4 at 405.

Performance contracting program[186]. Performance contract is an agreement between Government and head of state agency that delivers public service with quantifiable targets for a financial year; it has matrix that specifies the weight attached to a number of performance criteria. Migai explains that once such criteria is the service delivery criterion under which public institutions are evaluated based on several indicators such as complaints handling mechanism and implementation of the recommendations by the Commission[187].

According to the 2016 Report, the Commission handled 106, 733 complaints under the performance contracting obligation and resolved 96, 731 complaints[188]. This a commendable rate to dispute resolution however, some institutions are unresponsive to inquiries by the Commission and hence the Commission is unable to act swiftly which affects the turn-around time for the resolutions of complaints[189].

Judy Achieng observed of the need for co-operation by government agencies, institutions and official[190]. Judy observes that limited co-operation may hinder the Commissions investigative powers, since obtaining information urgently and timely replies are keyl to success of the Commissions mandate[191]. She attributes a number of reason to the limited co-operation by government institutions such as; "impunity, political resistance, insufficient framework that limits Commission's power, limited cooperation by courts in instances of not inline with public institutions with the decision of the Commission[192]".

[186] Supra n 4 at 404.
[187] Supra n 4 at 405.
[188] Supra n 132 at p 19.
[189] Supra n 132 at 72.
[190] Supra n 36 at 59.
[191] Supra n 36
[192] Supra

The question that then arises is what recourse the Commission has in such instances. The Commission may report such non-compliant state agencies in the reports to parliament. Judy however rightly observes that little or no action is taken[193]. The Commission can also refer criminal matters to the Office of the Director of Public Prosecutions (DPP) for further action or go to court. The CAJ Act allows the commission to come up with a register in which unresponsive public officers are cited. In contrasted, in other jurisdictions the Ombudsman has prosecutorial powers against non-responsive state official as will be discussed in the comparative section in chapter four.

The issue on whether the Commission has enforcement powers was litigated *in R –vs- Kenya Vision 2030 Delivery Board and another ex-parte Engineer Judah Abekah*[194]. The Board has failed to implement the Commission's recommendation and the Applicant moved the court seeking to compel the board to pay him as had been recommended by the Commission. The High Court held that the Commission's decision is not binding and hence court did not compel the respondent. The Commission appeal to the Court of Appeal was successful and in a recently delivered judgment, the Appellate Court found that the Commission's decision is binding. This makes a great milestone as public servants cannot just ignore the Commission's decision.

### 3.6 Increased litigation

There are increasing numbers of cases against the Commission, or cases which the Commission has to litigate in court. This is against a backdrop of limited finances and stretched

[193] Supra n 36 at 61.

[194] *R –vs- Kenya Vision 2030 Delivery Board and another ex-parte Engineer Judah Abekah (2015) eKLR*. Available at http://kenyalaw.org/caselaw/case/view/106164, (accessed on 17/1/2917).

human capacity. According to the 2016[195] report, there are increased court cases against the Commission which stretches its capacity. This poses as a hindrance to the Commission in achievement of its mandate and affects the turn-around time in dispute resolution[196]. In the 2015 report the Commission noted of the increased cases where litigants challenge the power of the Commission[197]. The effect is to delay the duration within which the complaint can be resolved.

Whereas in some instances the court has upheld the Commissions, there are other instances where the court has held adversely against the Commission. This is seen in *Republic v Commission Ex-Parte National Social Security Fund Board of Trustees.*[198]In this case, the Commission had investigated and made an adverse report on failure to follow procurement procedures by the NSSF Management. NSSF Board of Trustees as Applicant sought to quash the report by the Commission vide judicial review. The *Ex-parte* Applicant contested that the Commission did not have jurisdiction to investigate the allegation on misappropriation by the *ex-parte* Applicant and hence the inquiry report was a zero in law for want of jurisdiction. The Applicant sought to have the report by the Commission declared a nullity to avoid prejudice on the management.

Applicant contended that the issue investigated in the Commission's report fell in the jurisdiction of Ethics and Anti-Corruption (EACC) and further contested that the Public Interest Committee (PIC) was also investigating the matter. The Court upheld that the Commission had jurisdiction to investigate and make the report as at the time the Commission initiated its

[195] Supra n 132 at 72.
[196] Supra.
[197]Supra n 30.
[198]Supra n 28.

investigations, no other body had commenced investigations. The above decision confirms the investigatory role of the Commission.

The above is compared to *R –vs- Kenya Vision 2030 Delivery Board and another ex-parte Engineer Judah Abekah*[199] where the High Court had held that the Commission's recommendations are not binding. The Commission successfully appealed against the ruling in *Commission on Administrative Justice –vs- Kenya Vision 2030 Delivery Board and 2 Others*[200] and the Court of Appeal found that the Commission's recommendations are binding.

The effect of increase litigation is to stretch the Commissions financial and human resources. Further in some instances the Commission mandate has in some instances been limited by court decisions.

### 3.7 Accessibility Challenge

Any person aggrieved by maladministration and administrative injustices in public service ought to have access to the Commission. Accessibility of the commission is a crucial factor. This entails the physical accessibility to the population; public awareness of the existence of the ombudsman; public understanding on its functions; and real access to the services offered.

It also connotes the method of lodging complains and a means of improving accessibility. Judy Achieng argues that accessibility is an essential and universally recognized feature of

[199] Supra n 179.

[200] The Commission on Administrative Justice -vs- Kenya Vision 2030 Delivery Board and 2 others, Civil Appel no 141 of 2015.

ombudsman[201]. Public awareness of the existence of the office of the Ombudsman should be made and be able to physically access it. Judy posits that majority of the people are not aware of the physical offices where they can access the ombudsman and that majority of the people were not aware of the efforts done by the ombudsman to bring awareness to the public.

In Kenya, the Commission has offices in Nairobi, Kisumu, Eldoret and Mombasa and has desks in 11 Huduma Centers which limits its accessibility in other parts of the country[202]. The Commission attributes this to inadequate funding which makes it impossible to devolve to all counties. This implies that despite widespread maladministration and administrative injustices aggrieved persons in some areas have no near offices to lodge their complaints and may have to travel long distances to access the Commission.

The second aspect of accessibility is the complaint lodging mechanism. According to the Commission's 2016 Report, an aggrieved person may lodge a complaint through a toll free number, short message platform, email, social media or letters by post. The Act allows an aggrieved person to institute a complaint orally or in writing at no cost[203]. Even with such flexible model Judy observes that only few people are able lodge complains as majority of people are unaware of the presence of the Commission or the location of its offices[204].

In South-Africa the accessibility of the Public Protector is expressly stipulated in their Constitution. In Kenya no such provision in the law and accessibility is left at the Commissions

[201] Supra n 36 at 50
[202] Supra n 30.
[203] Section 33 of Commission of Administrative Justice Act No 23 of 2011.
[204] Supra n 36 at 49.

discretion. This means that parliament is not obligated to avail resources to the Commission to open more offices across the Country.

Accessibility to the office of the ombudsman is also hampered due to low level of cognizance of the existence and mandate of the ombudsman by the populace. This would call for sustained awareness by the Commission to sensitize the populace.

Judy observes that whereas in jurisdictions like Ghana and South-Africa have a sustained public education policy which has created awareness, there is no such public education policy in Kenya[205]. Judy observes even though the Kenya Commission conducts awareness creation activities the same seem to be few and far between and are not sustained[206]. The end result is that Kenyans remains unaware of the Commission and is mandate.

### 3.8 Effectiveness and Efficiency

The question of effectiveness of the Commission depends on the previously discussed challenges affecting the office. The commission can only be effective if it operates independently, with sufficient budget, sufficient capacity, with accessibility and with co-operation from government agencies[207].

The effectiveness can also be measured by the response from the public administration. As so long as there is politics of patronage and godfathers in government, such administrators

[205]Supra n 36 at 75.
[206]Ibid.
[207] Aufrecht, S.E. *et al.*, Evaluating ombudsman systems (2000), Available at https://www.eolss.net>sample , accessed on 4th April 2019.

whose integrity is questionable shall reign with impunity. Aufretch notes that as much as the appointment of administrators is still done in in transparent manner, dubious characters are still in office and they get the protection from the executive power.[208] This hinders the Commission's performance and effectiveness from such unresponsive agencies.

The measurement used to tell if there is effectiveness is by content analysis of reports and local literature and can suffice the purpose[209]. Relying on the reports and local literature to discuss if there is compliance or not, if the complaints are increasing or not, if the effectiveness of the commission can be enhanced by increasing its accessibility, its human resources, its binding enforcement powers amongst as discussed in this paper.

In conclusion, this chapter has discussed the challenges facing the ombudsman and whether the factors necessary for the efficiency of the Ombudsman have been incorporated in Kenya. This chapter has looked at the Legislative limitation-threat of abolition by parliament, independence, limited organizational capacity, insufficiency of the resources, poor co-operation by government agencies and limited enforcement mechanism, increased litigation, effectiveness and efficiency and accessibility challenge.

The above literature will be contrasted with lessons from comparative jurisdictions to wit; Sweden and South Africa and what lesson Kenya can learn from the two countries with or without amendments.

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[208] Supra.

[209] Nelson, H.W., 'Long-term care volunteer roles on trial: Ombudsman effectiveness revisited'. *Journal of Gerontological Social Wor*k (1995).

# CHAPTER FOUR

## LESSONS FROM COMPARATIVE JURISDICTION: PERSPECTIVE FROM SOUTH AFRICA AND SWEDEN

Chapter four discusses the South African Ombudsman and the Sweden Ombudsman. This section will discuss the establishment, composition, the legal positioning of the South-African and Swedish ombudsman. This section will discuss the legal context, the process of employing, removing an incumbent from office, the funding and the enforcement mechanisms. The section will further discuss the essential factors necessary for the efficiency of the ombudsman and how they have been incorporated in the two states. It will compare the above with the Kenya system as discussed in previous chapters.

### 4.1 Perspective from South Africa Public Protector –General overview

The South African ombudsman is referred to as the Office of the Public Protector (OPP)[210]. It is a constitutionally entrenched institution[211]. There are six state constitutional institutions established under chapter nine of the South African Constitution[212]. These institutions are named as follows: Auditor-General, Human Rights Commission, the Public Protector, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, the Commission for Gender Equality and the Electoral Commission.

[210] C Murray, 'The human rights commission et al: what is the role of South Africa's chapter 9 institutions? 2006(2).*African Journal Online* , available at https://www.ajol.info/index.php/pelj/article/view/43447 accessed on 3/9/2019.

[211]Sections 181 to 194 of the Constitution of the Republic of South Africa, 1996.

[212]Ibid.

Murray posits even though each of the Chapter Nine institution has its distinct mandates, the institutions have a role of checking government, which implies monitoring the government; and secondly the institutions contribute in transformation of South Africa into a country in which social justice prevails[213]. The same will be discussed together with other roles latter on in this chapter.

Apart from the South African Constitution, the Public Protector Act [214]and the Executive Members' Ethics Act[215] also give powers to the Public Protector. The powers under the Public Protector Act cover the conduct of all public authorities with exceptions such as court decisions. Under the Executive Members' Ethics Act, the OPP has power to investigate allegations of breach of the Act and Code by the members of the Executive (Ministers, Premiers, etc)[216]. Legislation such as the Executive Ethics Code, the Prevention and Combating of Corrupt activities Act[217], the Protected Disclosures Act[218], the Promotion of Access to Information Act[219]and the Housing Protection Measure Act[220] give powers to the OPP.

## 4.2 The legal positioning of the public protector

Members of the office of the Public Protector' includes the Public Protector, the Deputy Public Protector and such other staff as may be hired as stipulated under the Act[221].The Public Protector has the same rank as a judge of the High Court. He or she is selected in a

[213]Supra n 194.
[214] The Public Protector Act 23 of 1994.
[215]The Executive Members' Ethics Act 82 of 1998.
[216]Supra n194.
[217]Prevention and Combating of Corrupt Activities Act no 12 of 2004.
[218]Protected Disclosures Act No 26 of 2000.
[219]Promotion of Access to Information Act no 2 of 2000.
[220]Housing Protection Measure Act No. 95 of 1998.
[221] Section 1A, sections 3 (12) and 7 (3) (b), of Public Protector Act no 23 of 1994.

parliamentary selection process and voted by the National Assembly. Thereafter the president appoints the person recommended by Parliament[222]. He or she serves a seven-year non-renewable tenure[223]. The grounds and procedure to remove an incumbent from office are set out in the South African Constitution and the National Assembly Committee has to make a finding of incapacity, gross misconduct or incompetence and then a two third majority vote adopting a resolution to remove the Public protector[224].

The Public Protector is remunerated as a judge of the High Court and the amount cannot be abridged during their tenure[225]. The Act stipulates that the remuneration shall be same as that of a High Court Judge and the terms cannot be altered during one's tenure. This is to avoid intimidation by other arms of government and in a way protect its independence[226].

The method of appointment and removal of the Public Protector and the Commissioners where they are appointed by a majority in parliament is likely to guarantee independence and confidence by members of the public. In contrast executive appointees are seen as political appointees and is questioned as to whether they can independently pursue a complaint against the executive. This was the position in Kenya when the Public Complaints Standing Committee was set to be appointed by the President hence limiting the independence and it was questioned whether the PCSC could investigate the executive. This position has since changed under the Commission on administrative Justice Act[227] where a selection Panel consisting of various

[222]Supra.
[223]Section 183 of the Constitution of South Africa 1996.
[224]Supra n 205
[225] Ibid
[226]Ibid.
[227]Supra n 31.

professional branches would upon interviewing candidates recommend and the National Assembly will approve.

It is noted from the above that the OPP positioning in the legal framework is grounded in the Constitution. Katharina whilst discussing Namibia Ombudsman observes that being entrenched in the Constitution implies that the institution's permanence which promotes its independence and has a greater effect as compared to anchorage in statutes[228]. The constitutional amendment process meant to prevent frequent amendments by the Parliament, Executive and any other body. By incorporating the OPP into the Constitution its permanence is underlined as constitutional amendments are subject to certain strict conditions[229].

Katharina postulates that such entrenchment in the constitution fosters stability of the office gives credibility and improves the public's perceptions[230]. The OPP can hence investigate cases even those affecting the president or executive without fear that the office will easily be closed down or restricted.[231]

The above is compared to the Kenyan Commission which is established under (CAJ Act)[232]. The Commission as established under act can easily be abolished by the Parliament. The Commission lacks the benefits of constitutionally established institution which cannot be easily abolished by the Parliament or executive and would require a referendum to be abolished.

[228]Supra n 137.
[229]Ibid.
[230]Ibid.
[231]Ibid.
[232]Supra n 31.

Further, section 55 of the CAJ Act allows Parliament, upon expiry of five years, to review the Ombudsman and possibly amalgamate it with the Human Rights Commission.[233] The CAJ Act came into force on 5th September 2011; this means that parliament can easily abolish the Commission at any time. This would be detrimental for the following reasons first; the Commission is seen as a specialized tribunal to handle maladministration and administrative injustices. Legomsky argues that specialized courts on administrative justice include the use of tribunal systems to settle disputes and offer mediation and make decisions.[234] Specialization allows an institution to focus on administration of justice. Abolishing the Commission would negate the benefits of a specialization of the Commission. It is noted that there have been efforts to rectify the position under the Commission on Administrative Justice (Amendment) Bill2019 which is due for the Committee of the whole House.

### 4.3 Functions of the Public Protector

C. Murray posits that the mandate of the Public Protector is to promote democracy by following up on state organs on whether they are accountable, fair and responsive to citizens in delivering services[235]. This in turn promotes integrity and general good governance in the management of public resources.

The South African Constitution gives power to the Public Protector to look into the conduct in state affairs, or in the public administration in particular allegations of impropriety or

[233] Ibid.
[234] Supra n 52.
[235] Supra n 31.

conduct which is prejudicial to any member of the public[236]. He or she is to interrogate the allegation, make a report and take appropriate remedial action.

The Public Protector has the additional functions prescribed under the Public Protector Act[237]. The Public Protector can investigate maladministration at any level of government. The public protector has powers to probe into allegations of improper conduct, abuse/unjustifiable exercise of power, undue delay, unfair treatment and discourteous public servants. Further, it can probe allegations of dishonesty, omission actions raising offences relating to prevention and combating Corruption.[238]

The Executive Members' Ethics Act[239] gives more functions to the Public Protector to probe and submit a report on breach of code of ethic within 30 days of receipt of complaint. This covers allegation against president, a member of the National Assembly, Cabinet, Premier, permanent delegate to the National Council of Provinces, a member of the provincial legislature of a province. Indeed, the Public Protector has successfully probed a claim against an incumbent president as will be discussed later. In Kenya under the CAJ Act it is questionable as to whether the CAJ can investigate any complaint against the President.

There are other legislations which give powers and functions to the Public Protector. This include: Executive Ethics Code, the Prevention and Combating of Corrupt Activities Act[240], the

[236]Section 182 of the South African Constitution 1996.
[237]Section 6(4)(i-v) of the Public Protector Act No. 23 of 1994.
[238]Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004, with respect to public money.
[239]Section 3 of the Executive Members' Ethics Act 82 of 1998
[240] Prevention and Combating of Corrupt Activities Act no 12 of 2004.

Protected Disclosures Act[241], the Promotion of Access to information Act[242] and the House Protecting Measure Act[243].

## 4.4 Essential elements enhancing effectiveness of the Public Protector

There essential elements that enhance the effectiveness of the ombudsman in improving public administration and protecting human rights. Linda C. Reif states these factors to include: independence, defined jurisdiction, adequate powers, accessibility, cooperation, operational efficiency and accountability. This part will discuss these factors in the South-African Context[244].

### 4.4.1 Independence

Katharina G Ruppel-Schlichting[245]whilst discussing independence of ombudsman in Namibia posits that independence is fundamental and indispensable aspect of the ombudsman. Katharina generally describes independence to be a state of not being controlled by other people or things[246]. The rationale for independence is that an ombudsman should be able to conduct fair and impartial investigations, credible to both complainants and the authorities that may be reviewed by of the Ombudsman[247].

[241]Protected disclosures act 26 of 2000.
[242]Promotion of Access to information Act 2 of 2000.
[243]House Protecting Measure Act 95 of 1998.
[244]Supra n 1at 396.
[245]Supra n 137.
[246]Ibid.
[247]United Nations Development Programme. 2006. Guide for Ombudsman institutions: How to conduct investigations. Bratislava: UNDP at 12 available at https://www.eurasia.undp.org>library, accessed on 3/9/2019.

The independence of the Public Protector and other Constitutional institutions under Chapter nine of the South African Constitution is provided for in the Constitution[248].Together with the other Constitution Institutions established under chapter nine, the Constitution declares the institutions as independent, and subject only to the Constitution and the law This is to enhance impartiality, to enable OPP exercise powers and perform its functions without fear, favor or prejudice.

C. Murray discusses institutions established under the constitution including the Public Protector and posits that they are independent subject to the Constitution and the law only[249]. Murray posits independence implies impartiality, non-partisan politics, and free from interference by other state organs.[250]He posits that the Constitution asserts independence in strong terms, using language similar to that used to declare courts independence[251].

The South African Constitution further stipulates the functions of the OPP should not be interfered with by any person or state. Instead, all are required by the Constitution to assist, protect the OPP and other constitutional institutions to ensure their independence, impartiality, dignity and effectiveness.

The South African Constitution and legislations does not define what independence is and components/attributes. It is therefore imperative to briefly highlight independence and its components. Katharina G Ruppel-Schlichting posits that independence is multifaceted with material components such as the legal position of the OPP, to whom is the ombudsman

[248]Section 181 of the South African Constitution 1996.
[249]Supra n 194.
[250] Ibid.
[251]Supra n 194.

accountable to; how the ombudsperson is appointed and removed from office; how its funded; what mechanisms it has to enforce its decision and the investigation process[252] .

### 4.4.2 Accessibility

Accessibility can be construed to refer to the physical accessibility of the office of ombudsman, the ability to lodge complains and the real access to the services of the Ombudsman. Judy Achieng posits that 'real accessibility is not only in terms of physical access but also includes flexibility of process and procedures[253]'.

The South African Constitution stipulates the OPP to be accessible to all persons and communities[254]. Further, that any report submitted by OPP must be accessible to all unless there is a law requiring such report be kept confidential[255]. Judy Achieng whilst quoting Kevin Malunga acknowledges that the Office of the Public Protector has witnessed massive growth in accessibility and awareness[256]. This she attributes to among others; the constitutional requirement that the OPP be accessible to all persons; and the increased awareness of existence of the office by the populace.

Judy Achieng observes that in some jurisdictions such as in Ghana their legislation provides for accessibility[257]. In Ghana the Commission on Human Rights and Administrative Justice Act stipulates that the institution should establish branches in each Region and District of Ghana[258]. Such Constitutional or statutory provisions gives an obligation to the Commission to

[252]Ibid
[253]Supra n 36.
[254]Section 182 (4) of South African Constitution.
[255]Section 182 (5) of South African Constitution.
[256]Supra n 36.
[257] Ibid.
[258]Ghana the Commission on Human Rights and Administrative Justice Act.

establish branches in regions hence enhancing the Physical accessibility of the Commission. Judy rightly notes that there is no such constitutional or statutory requirement for the Kenyan Commission on Administrative Justice to establish braches, and is up-to the discretion of the Commission. This paper argues that without such constitution or statutory requirement, the parliament will not be obliged to allocate enough resources to open branches in each of the 47 counties. This is manifest in the CAJ report where the Commission decried on inadequate resources to open more branches in the counties[259].

Accessibility to the office of the ombudsman in Kenya has been hampered due to low level of awareness of its existence and its mandate by the members of the populace. This calls for sustained awareness programs by the Commission to sensitize the populace. Judy observes that whereas Ghana and South-Africa have a sustained public education policy which has created awareness, there is no such public education policy in Kenya[260]. Judy observes even though the Kenya Commission conducts awareness creation activities the same seem to be few and far between and are not sustained[261]. The end result is that Kenyans remains unaware of the Commission and is mandate.

### 4.4.3 The Jurisdiction, powers and enforcement

The OPP derives its mandate from the Constitution and acts of parliament. Judy Achieng notes six key mandates which include: maladministration, anti-corruption, enforcement of executive ethics, regulation of information, whistle blowers protection and review of decision by

[259] Supra n 30.
[260] Supra n 36 at 75.
[261] Ibid.

the Home Builders Registration Council[262]. The office can act on complaints received from populace or on its own accord.

The OPP can investigate maladministration at any level of government. It has powers to probe into allegations of improper conduct, abuse/unjustifiable exercise of power, undue delay, unfair treatment and discourteous public servants. Further, it can probe allegations of dishonesty, omission actions raising offences relating to prevention and combating Corruption.[263]

The Executive Members' Ethics Act gives more functions to the Public Protector to probe and submit a report on breach of code of ethic within 30 days of receipt of complaint[264]. This covers allegation against president, a member of the National Assembly, Cabinet, Premier, permanent delegate to the National Council of Provinces, a member of the provincial legislature of a province. Indeed, the Public Protector has successfully probed a claim against an incumbent president[265]. In Kenya under the CAJ Act it is questionable as to whether the CAJ can investigate any complaint against the President.

Upon investigating a complaint, the Public protector makes recommendation to respective state organ to remedy the complaint. The debate that has been is whether such recommendations ought to have a binding effect of the state organ. Judy Acheing observed that initially the Public Prosecutor could only make recommendation but could not enforce them. This position however changed when the Constitutional Court of South Africa declared remedial

[262]Supra n 36 at 91.
[263]Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004, with respect to public money.
[264]Section 3 of the Executive Members' Ethics Act 82 of 1998.
[265]

action should be binding in *Economic Freedom Fighter –vs Speaker of the National Assembly and others*[266]. The Court found that President Jacob Zuma breached the South- Africa constitution by failing to implement recommendation by the Public Protectors report to refund public money used to renovate his house in Nkandla. The South Africa Supreme Court *in South African Braodcasting Corporation Soc Ltd others –vs- Democratic Alliance and Others* held that the report by the Public Prosecutor as legally binding and that without the power to make binding recommendation public prosecutor would be ineffectual[267].

It is noted that in Kenya, the Commission decision were not binding hence affecting its enforcement powers. The issues on whether the Commission's decision are binding and its enforcement powers was litigated *in R –vs- Kenya Vision 2030 Delivery Board and another ex-parte Engineer Judah Abekah*[268]. The Board had failed to implement the Commission's recommendation and the Applicant moved the court seeking to compel the boards to implement the recommendations by the Commission. The High Court held that the Commission's decision is not binding and hence did not compel respondent to implement recommendations of the Commission. The above decision was recently overturned at the Court of Appeal which court declared that the Commission's decision is binding[269].

From the court interpretation on the binding and enforcement powers of the Ombudsman, it is noted that the South Africa court took into consideration many factors. As Judy quotes 'the time, money and energy expended on investigation, finding and remedial action

[266][2016] zacc 11.
[267][2015]ZASCA 156.
[268] Supra n 179.
[269] The Commission on Administrative Justice -vs- Kenya Vision 2030 Delivery Board and 2 others, Civil Appel no 141 of 2015.

taken, would never make sense if the Public protectors power or decisions were want to be inconsequential'[270]. In Kenya most State Officers and Public Officers misuse public resources. This is seen in unnecessary foreign trips and other public resources abuse. Adopting the position taken by the South African Courts will enable quick and speedy investigation by the Commission and speedy recovery of public resources that has been misused.

### 4.4.4 Cooperation with other state organs

The South-African Constitution requires state organs to cooperate with the Public Protector. The Constitution couched in mandatory terms provides that;

> 'through legislative and other measures, must assist and protect these institutions to ensure the independence, impartiality, dignity and effectiveness of these institutions; No person or organ of state may interfere with the functioning of these institutions'.

Judy[271]observes that in Kenya there no similar express provision in Constitution requiring government institutions to cooperate and support the Commission. Migai Aketch observes that there are instances where State Officer and Public Officers would fail to respond to queries or summons issued by the Kenyan Commission on Administrative Justice[272].

## 4.5 The Swedish Ombudsman

The Swedish Ombudsman on the other is traced to 1809. Linda traces the concept of ombudsman to the Swedish Ombudsman and the word ombudsman is interpreted to mean a

[270]Supra n 36 at 92.
[271] Ibid.
[272]Supra n 4 at 401.

representative[273]. Linda C. Reif[274] explains that the Swedish Ombudsman referred to as *justitieombudsman* was instituted in 1809 when the Swedish King went to Turkey for some years after being defeated by Russia. She states that the King observed that the administration had deteriorated and the King appointed an official to monitor administration and judiciary. If violation of law or misconduct had been discovered, the official was could institute legal proceedings against the wayward official[275].

Walter Gellhorn posits that the Swedish Constitution requires that the Ombudsman to be a person of known legal ability and outstanding integrity[276]. He or she is voted by both Chambers of Parliament with at least twenty-four from each Chamber of Parliament[277].In terms of remuneration, the salary is set to be equal to that of a Supreme Court Judge, tenure of four years and can only be removed by parliament on the grounds set out under the law[278].

Walter notes that, the Swedish Ombudsman is responsible to and reports to the parliament and is immunized against political pressures of the day. The Deputy Ombudsman is also selected by parliament in the same manner as is the Ombudsman himself[279]. The Deputy Ombudsman is answerable directly to Parliament and not to the Ombudsman. Walter observes that initially, the Deputy was to serve only during the Ombudsman's incapacity or absence which has changes as his work is now performed on a full-time basis.

[273]Supra n 1.
[274]Ibid.
[275]Ibid.
[276]Walter Gellhorn, The Swedish Justitie ombudsman, Yale Law Journal (1995) 1 available at https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=9200&context=ylj accessed on 3/9/19.
[277]Ibid.
[278]Ibid.
[279]Ibid.

The Swedish Ombudsman derives its powers from the Constitution[280]. The Constitution stipulates that ombudsman is to supervise the observance of laws as applied by public officials[281].In performing his duties, Walter explain that ombudsman powers are wide and has unlimited access to information and records. Further ombudsman may call on any high rank official for an explanation of his acts or opinion on lowlier officials and is also to be present as a silent observer during the deliberations of all courts and administrative bodies.[282]The powers of the ombudsman are however limited as the ombudsman cannot control over what judges do and no power to deal with the Cabinet Ministers (Councilors of Sate) who can only be impeached upon the initiative of Parliament[283].

From the foregoing, this paper finds that finds that in Sweden the ombudsman concept was introduced as early as in 1809[284]. In South Africa, the Public Protector was introduced in 1996. In Kenya ombudsman was introduced in 2007 and subsequently in 2011. This means that other jurisdictions have had a longer period to exercise the powers of the ombudsman and get support from court. Despite its young state, the Ombudsman in Kenya has high potential of becoming a very powerful and strong public institution and can borrow from South Africa and Sweden.

In conclusion, the above section has discussed the Ombudsman Concept in South Africa and Sweden. It has looked in a comparative aspect of the establishment, composition, powers and functions. It has also looked at how the essential elements have been incorporated. It has looked at factors such as the position of the ombudsman in the legal framework, composition,

[280]Article 96 of the Swedish Constitution.
[281]Ibid.
[282] Supra n 257.
[283]Ibid.
[284]Supra n 1 at 396.

appointed, tenure, independence, and jurisdiction amongst other. The findings of this chapter and previous chapters have created a basis for the conclusion and recommendation as discussed in chapter five.

# CHAPTER FIVE

## SUMMARY AND FINDINGS

## 5.1 EXPOSITION OF THE SUMMARY AND FINDINGS

The concept of ombudsman was established to deal with maladministration, administrative injustices in public service. It has been used to enhance access to justice in public service delivery. This paper looks at the role of the Commission in Kenya; discusses the challenges facing the Commission and prospects. It highlights perspective from comparative jurisdiction being South Africa and Sweden with the findings and recommendations discussed below.

Chapter one of this research finds that ombudsman system has gained a great world momentum in many countries in the world. In countries such as Sweden the ombudsman concept was introduced as early as in 1809[285]. In South Africa, the Public Protector was introduced in 1996. Other jurisdictions have over the years adopted the concept in order to deal with complaints on maladministration and administrative injustices.

Chapter one analyses what is this concept of ombudsman in public administration. Further, chapter one it discusses what the justification of having ombudsman in various jurisdictions is. In summary this paper finds that ombudsman is a concept that brings relief to citizens in a cheap, informal, expeditious process. It is a process that is not bound by precedents, is flexible and reviews a wide range of disputes some of which would not meet the legal

[285]Supra n 1.

threshold of a court dispute and some of which are non-justiciable. Its institutionalization is seen as a means of creating fair relationship between government and citizens.[286]

Chapter also considers why the Kenya government was hesitant to establish an ombudsman office and finds that even though there were several recommendations by the Ndegwa Committee and Waruhiu Committee to establish the office of ombudsman the same was met with resistance from the government[287]. It was deemed as a way of witch-hunting government officials[288]. It was only in 2007 when the then President appointed the Public Complaints Standing Committee as an executive appointment[289]. The current Commission was established under CAJ Act which came into force in 2011.

Chapter two looks at what was the historical perspective of ombudsman office in Kenya. In summary the PCSC was established as an executive ombudsman as was appointed by the then president. The Office was placed under the Ministry of Justice, National Cohesion and Constitutional Affairs which affected its accessibility. The paper finds that the manner in which an ombudsman is appointed affects its independence, impartiality and extent of jurisdiction. In this case the PCSC as the established was not independent and could not impartially investigate complaints against the executive hence it was not effective. The president could easily abolish the office. This is contrasted with the South African Public Protector which is a constitutionally established institution, selected through a panel, with security of tenure provided for under the constitution, the terms of service been provided for under the constitution hence promoting its independence and impartiality.

[286] Supra n 13.
[287] Supra n 15 at 143.
[288] Supra n 14.
[289] Supra n 15 at 143.

Indeed, the South African Public Protector successfully investigated a sitting president Jacob Zuma and the court upheld the finding of the Public Protector which required the president to refund the public funds which has been misused. The Constitutional Court of South Africa declared remedial action recommended by Public Protector should be binding in *Economic Freedom Fighter –vs Speaker of the National Assembly and others*[290]. The Court found President Jacob Zuma to have breached the South- Africa Constitution by failing to implement recommendation by the Public Protectors report to refund public money used to renovate his house in Nkandla.

Chapter two further discussed what is the justification of having the Commission on Administrative Justice in Kenya. That good administration requires a mechanism for addressing grievances arising from maladministration and administrative injustices[291]. The concept of ombudsman offers administrative remedies which traditional/ court administrative remedies such as declaration of rights may be inadequate to deal with administrative errors[292]. Ombudsman concept offers redress to grievances which may not meet the legal threshold for court remedies. Ombudsman offers redress to non-justiciable claims. The ombudsman concept offers a speedy, informal, cheap dispute resolution mechanism and acts as an intermediary between the government and individuals. This paper agrees with Migai position that the ombudsman concept is a useful mechanism for realization of good governance. It is an institution placed to ensure accountability in public administration due to its unique approach to justice such as: not being

[290][2016] zacc 11.
[291]Supra n 4.
[292]Ibid.

subject to strict legal formalities, not charging fee to complainants, being independent of other state bodies and acting as an intermediary between the public and the government[293].

Another justification for which Ombudsman in Kenya is to operationalize the access to justice principle, promote fair administrative action, operationalize right to access to information[294]. These are human rights which every person is entitled to by virtue of being human.

Chapter two also elucidates the ombudsman as a specialized tribunal. Specialized courts on administrative justice include the use of tribunal systems to settle disputes and offer mediation and make decisions[295]. Specialization enables the ombudsman to focus on administrative justice and come up with most desirable system in terms of efficiency, speedy, cheap avenue to address maladministration and administrative injustices[296]. For the sake of access to justice and efficiency of the judicial system, the office of ombudsman is specialized in public complaints related to maladministration and administrative injustices. Such specialization of justice is found within administrative systems with tribunals, commissions, or specialized government agencies. Each specialized body has qualification and experience in a particular sector of profession. The rationale is to make access to justice effective and efficient to settle disputes in the most coherent way possible and ensure that justice is not only done but must be seen to be done. This paper finds that the ombudsman Kenya is a specialized model to facilitate access to justice in complaints under its jurisdiction.

[293]Ibid at 3.
[294]Articles 35, 47 and 48 of the Constitution of Kenya 2010.
[295]Supra n52.
[296]Ibid.

Chapter two further expounds the establishment and roles Current Commission. This paper finds that there is an improvement in the appointment and selection process where the current Commission is selected by a panel and has to be approved by Parliament. The Commission also reports to the Parliament and not the executive. The Commission's role includes; investigation, setting up complaints handling mechanism, hearing and prescribing remedies, regulation/ policy making, advisory / proposal, creating public awareness, reporting to parliament, promoting alternative dispute resolution and operationalizing the Access to Information Act.

Chapter three expounds on whether the Commission is facing challenges whilst performing its mandate. In summary the challenges include: the legislative limitation/threat of abolition of parliament; interference with independence; limited accessibility, limited jurisdiction, lack of prosecutorial powers and enforcement powers, limited cooperation by state organs.

A to whether the Commission under threat of abolition is due to the fact that Section 55 of the CAJ Act allows parliament review the Commission and possibly amalgamate the CAJ with the Human Rights Commission. This will be detrimental and will lose the specialization aspect of the Commission. The Commission as it is established under the CAJ Act as compared to the Swedish and South African ombudsman both are constitutionally entrenched institutions. This means that in Kenya the parliament can easily interfere with the existence or functions of the Commission. There are however efforts to have section 55 of the CAJ Act repealed vide the Commission on Administrative Justice (Amendment) Bill 2019 which is yet to be assented to

since 2019[297]. This paper recommends that Session 55 be repealed to avoid the possibility of the Commission being abolished. Further the Commission is better protected if it is entrenched in the constitution to underline its permanence.

It is noted that Public Protector Position in legal framework is in the Constitution. Entrenchment in the Constitution protects its independence and it underlines its permanence[298]. This prevents frequent amendments by the parliament, executive and any other body[299].

On the issue of whether the Commission has adequate organization capacity, this paper finds there is wide spread maladministration and administrative injustices in the public service which is to be dealt with by a limited number of Commissioners. This coupled with the Commissions role under the Access to Information Act hence the need to increase its Commissioners.

The question as to whether the allocation of resources is adequate, this finds paper that the Commission has insufficient resources. The Commission's reports decry of insufficiency of resources which make it hard for the Commission to increase its offices and hire enough staff. This hinders the Commissions physical accessibility and the real accessibility to the Commission's functions such as investigations which may require resources and hence the need to increase resources.

On the level of co-operation by government agencies, this paper finds that there is increase cooperation by state agencies (MDA) through the governments performance contracting

[297] Commission on Administrative Justice (Amendment) Bill 2019 available at http://kenyalaw.org/kl/index.php?id=0129, accessed on 4/8/2021.
[298] Supra n 137.
[299] Ibid.

program[300] and public servants are apprehensive of failure to comply with the recommendations by the Commission. There are however, institutions that are un-responsive to inquiries by the commission. This can be attributed to factors such as failure by such institution to recognize the role of the Commission as such institutions seek directions from the Attorney General Office. This can also be attributed by lack of prosecutorial powers and the High Court decision which had held that the Commission's decisions are not binding. There is a change from the above decision by the Court of Appeal in t*he Commission on Administrative Justice -vs- Kenya Vision 2030 Delivery Board and 2 others*[301] which held that the Commission's decision is binding.

This paper recommends that the Commission be granted prosecutorial powers against such unresponsive institutions. The South Africa Public Protector has such prosecutorial powers. The Swedish Ombudsman has wide powers too, it has unlimited access to official file and records and may even seat during deliberations of all courts and administrative bodies.

On the question of accessibility, the same can be looked at from the physical accessibility and the technical accessibility. Physical accessibility the Commission will require more offices in all the counties which will require more finances. The technical accessibility implies factors such as the approachability, mechanism to lodge a complaint, jurisdiction, powers and functions, real accessibility to the services offered by the Commission such as investigation, rectifying and redressing any complaints. Accessibility is also determined by the level of awareness of the existence and the functions of the Commission.

[300]Supra n 4.
[301]The Commission on Administrative Justice -vs- Kenya Vision 2030 Delivery Board and 2 others, Civil Appel no 141 of 2015.

This paper finds that the Commission accessibility is hampered due to limited resources allocated to the Commission which makes it difficult to establish new branches across the country. That the Commission needs to increase it public awareness policies as citizens don't know of the existence and functions. There is also need for legal framework on public awareness and accessibility as is the case in South African. The inclusion of the accessibility in our laws will serve several purposes first: it will mandate parliament to allocate more resources to the Commission to establish and maintain branches across the country; enhance physical accessibility both urban and rural areas; increase awareness on the ease and use of Commission in accessing justice; and improve the real access to the services offered by the Commission such as investigating, rectifying and redressing complaints.

On the concern of enforcement, Judy decries that the Commission has no enforcement powers and hence its recommendation is not taken seriously by some institutions. Judy also posits that lack of coercive power sis a major blow to the Commission. The High Court decision in *Judah Abekah* case further limited the enforcement powers of the Commission unlike the South African court which upheld the binding powers of the Public Protector.

Migai posits that Ombudsman should use a soft moral-suasion approach in enforcement and the focus being in engaging the state agency in question for compliance in a soft approach rather than focusing on the coercive enforcement powers. This is because making ombudsman's decision binding and having enforcement powers turns the Commission like the other judicial and quasi -judicial institutions. The above position changed on 27th September 2019 when the

Court of Appeal in *The Commission on Administrative Justice -vs- Kenya Vision 2030 Delivery Board and 2 others*[302] held that the decision of the Commission is binding.

On the issue of independence, this paper finds that Commission's independence has improved as it is accountable to parliament and not the executive. However, since the commission is not a constitutionally entrenched institution, the Parliament can interfere with its existence or function hence the need to be entrenched in the Constitution. The South African Public Protector's independence is provided for in the Constitution. No similar provision in Kenya constitution. This paper recommends that there be provision in law to protect the independence of the Commission.

On the issue of organization capacity, this paper recommends an increase in the numbers of commissioners to 7 to allow the Commission have sub-committee to handle complaints under its mandate. This will allow the Commission to deal with its wide mandate under the various legislations as discussed in this paper.

Lastly, the Commission on Administrative Justice in Kenya has made it possible for the citizens to find locus in the administrative justice which had not been handled properly in the past. It is the office that receives public complaints on maladministration and administrative injustice. Citizens find where to raise complaints against the administrators working for the government on various issues. Such grievances and complaints are screened, heard, and appropriate action is taken in accordance with the law. The Commission therefore offers a cheap, expedient forum and enhances access to justice. The Commission is however faced with

[302] The Commission on Administrative Justice -vs- Kenya Vision 2030 Delivery Board and 2 others, Civil Appel no 141 of 2015.

challenges as discussed above. Despite the challenges the Ombudsman in Kenya has high potentiality of becoming a very powerful and strong public institution if the recommendations are taken into consideration.

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