

**DEVOLUTION OF WILDLIFE MANAGEMENT IN KENYA TO
ENHANCE COMMUNITY PARTICIPATION: AN ASSESSMENT OF
KENYAN LEGAL FRAMEWORKS**

BY

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A Thesis submitted in partial fulfilment of the requirements for the award of the
degree of Master of Laws (LL.M.) of the University of Nairobi.

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DECLARATION

I Wamukoya Fransesca Didi do hereby declare that this is my original work and has not been submitted for a degree in any other university.

Signature

Date

This thesis has been submitted with my approval as the university supervisor.

Signature

Date

Prof. Patricia Kameri-Mbote

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DEDICATION

This work is dedicated to my father Joe a man of great wisdom and my mother Elizabeth a woman of strength who believes in my abilities more than I do.

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ABBREVIATIONS AND ACRONYMS

AG	-	ATTORNEY GENERAL
CBD	-	CONVENTION ON BIOLOGICAL DIVERSITY
CIC	-	COMMISSION FOR THE IMPLEMENTATION OF THE CONSTITUTION
CIOC	-	CONSTITUTIONAL IMPLEMENTATION OVERSIGHT COMMITTEE
CoK	-	THE CONSTITUTION OF KENYA, 2010
CWA	-	COUNTY WILDLIFE ASSOCIATION
CWCC	-	COUNTY WILDLIFE CONSERVATION COMMITTEE
DFRD	-	DISTRICT FOCUS FOR RURAL DEVELOPMENT
EMCA	-	ENVIRONMENTAL MANAGEMENT AND COORDINATION ACT, 1999
HWC	-	HUMAN WILDLIFE CONFLICT
IHCC	-	ISHAQBINI HIROLA COMMUNITY CONSERVANCY
IRTC	-	INTERGOVERNMENTAL RELATIONS TECHNICAL COMMITTEE
KEPSA	-	KENYA PRIVATE SECTOR ALLIANCE
KWCA	-	KENYA WILDLIFE CONSERVANCIES ASSOCIATION
KWS	-	KENYA WILDLIFE SERVICE
NGO	-	NON-GOVERNMENTAL ORGANIZATION
PA	-	PROTECTED AREA
UNEP	-	UNITED NATIONS ENVIRONMENT PROGRAM
WAC	-	WILDLIFE ADVISORY COUNCIL
WCMA	-	WILDLIFE (CONSERVATION AND MANAGEMENT) ACT (CAP 376)
WCMB	-	WILDLIFE CONSERVATION AND MANAGEMENT BILL, 2013 (JULY 2013)
WCMD	-	WILDLIFE CONSERVATION AND MANAGEMENT DEPARTMENT
WRC	-	WILDLIFE REGULATORY COUNCIL

TABLE OF CASES

Galana & 3 Others v AG & 2 Others [2007] eKLR

Hassan & 4 Others v KWS (1996) 1KLR (E&L)

Mada Holdings Ltd t/a Fig Tree Camp v County Council of Narok [2012] eKLR.

Republic v Minister of Forestry and Wildlife and 2 Others ex parte Charles Oduor Okello and 5 Others [2012] eKLR

TABLE OF STATUTES AND INTERNATIONAL INSTRUMENTS

(a) Laws of Kenya

Constitution of Kenya

County Governments Act, 2012

Environmental Management and Coordination Act, 1999

Intergovernmental Relations Act, 2012

Land (Group Representatives) Act (Cap 287)

Local Government Act (repealed) (Cap 265)

National Government Coordination Act, 2013

Transition to Devolved Government Act, 2012

Urban Areas and Cities Act, 2012

Wildlife (Conservation and Management) Act (Cap 376)

(c) Proposed Legislation

Wildlife (Conservation and Management) Bill, 2013 (Published on 22nd July 2013 in Kenya Gazette Supplement No. 107)

Community Land Bill, 2011 (Unpublished)

(d) Regional and International Instruments

African Convention on the Conservation of Nature and Natural Resources, 1969

Convention on Biological Diversity, 1993

Langkawi Declaration on the Environment, 1989

CHAPTER 1

INTRODUCTION

1.1 INTRODUCTION

Wildlife management in Kenya has generally been undertaken by the state on behalf of the Kenyan people. The Constitution encourages public participation in the management of the environment.¹ It also provides for national values and principles of governance in Kenya, including devolution and public participation.² EMCA defines the term ‘environmental element’ to include wildlife.³ This thesis studies the practical application of the national values and principles of devolution and public participation as one of the ways of enhancing community participation in wildlife management. It assesses the problem of centralization of wildlife management in Kenya and the adequacy of the legal frameworks to encourage community participation through devolution.

1.2 BACKGROUND

Traditional communities in Kenya historically lived in harmony with wildlife.⁴ With the coming of Europeans and subsequent colonization, the existing systems were viewed as inferior⁵ and a western model was adopted.⁶ Large areas of traditional common property were cordoned off to create protected areas⁷ and ownership of land was transferred from traditional authorities to the state.⁸ The colonial models were based on the American approach of pristine wild areas.⁹ Thus

¹ Article 69(1)(d).

² Article 10(2)(a).

³ Section 2.

⁴ Dilys Roe *et al.* (eds), *Evaluating Eden; Exploring the Myths and Realities of Community-Based Wildlife Management* (Series No. 8, IIED 1994) 30.

⁵ V.O. Wasonga, D. Kambewa and I. Bekalo, 'Community-Based Natural Resource Management' in Washington Ochola, Pascal Sanginga and Isaac Bekalo (eds), *Managing Natural Resources for Development In Africa: A Resource Book* (University of Nairobi Press, 2010) 165,168.

⁶ Roe *et al.* (n4) 22.

⁷ *Ibid.*

⁸ Wasonga, Kambewa and Bekalo (n5) 168.

⁹ *Ibid.*

the National Park system, which was posited in the United States of America by John Muir¹⁰ was introduced to Kenya.¹¹

In 1933, a Conference on Wildlife Conservation was held in London and one of the resolutions was that National Parks be established in East Africa for management of wildlife.¹² The colonial government thereafter appointed the Game Policy Committee in 1938 which recommended the creation of two government institutions to administer wildlife management.¹³ The Kenya National Parks Organization was created to manage National Parks and the Game Department was created to manage all wildlife outside National Parks.¹⁴ This was the commencement of the history of centralization of wildlife management in Kenya.¹⁵

Kenya, in line with centralist policies, maintained the colonial fortress approach to wildlife management.¹⁶ This was a top-down approach where the state undertook management of wildlife on behalf of the people.¹⁷ Colonial legal frameworks on use of natural resources did not explicitly grant rights for wildlife management to local communities.¹⁸ In 1969, Kenya became a signatory to the African Convention on the Conservation of Nature and Natural Resources.¹⁹ The fundamental principle of this convention was the adoption of measures to ensure conservation of natural resources with due regard to the best interests of the people.²⁰ It provided that the parties would take legislative measures to reconcile customary rights with its

¹⁰ American naturalist and early advocate of preservation of wilderness in the USA.

¹¹ Roe *et al.* (n4) 22.

¹² Daniel Musili Nyeki, *Wildlife Conservation and Tourism in Kenya* (Jacaranda Designs Ltd. 1993) 3.

¹³ *Ibid* 4.

¹⁴ *Ibid*.

¹⁵ Dennis A. Rondinelli, John R. Nellis and G. Shabbir Cheema *Decentralisation in Developing Countries; A Review of Recent Experience* (World Bank, 1983) 19.

¹⁶ Fumihiko Saito, 'Local Council Commons Management in Uganda: A Theoretical Reassessment' (2007) Nagoya University Discussion Paper No. 153 <<http://www.gsid.nagoya-u.ac.jp/bpub/research/public/paper/article/153.pdf>> accessed 7 December 2012.

¹⁷ Wasonga, Kambewa and Bekalo (n5) 168.

¹⁸ *Ibid*.

¹⁹ (entered into force 16 June 1969) <<http://www.kenyalaw.org/treaties/treaties/37/AFRICAN-CONVENTION-ON-THE-CONSERVATION-OF-NATURE-AND#475>> accessed 12 December 2012.

²⁰ *Ibid* Art. II.

provisions.²¹ Thereafter, Kenya attempted to move away from the colonial approaches to wildlife management by coming up with the wildlife policy of 1975.²² This policy recognised the value of wildlife outside protected areas.²³ It proposed decentralisation of wildlife management by providing that government only be a facilitator and advisor working with communities.²⁴

In 1976, the Wildlife (Conservation and Management) Act (WCMA)²⁵ was enacted to give effect to the policy. However, according to Mbote, it retained a centralist approach despite being cast within the framework of decentralisation in the policy.²⁶ It merged the two government departments into one, that is, the Wildlife Conservation and Management Department under the then Ministry of Tourism and Wildlife, thereby effectively concentrating management of wildlife within the central government.²⁷

From the 1980's African governments were being pressured to adopt legal frameworks that increased community participation in wildlife management.²⁸ In 1989, Kenya adopted the Langkawi Declaration on the Environment²⁹ which recognized that the success of environmental programmes depended on the participation and commitment of all levels of society.³⁰ Against this background, the WCMA was amended in 1989 to create KWS as an autonomous state corporation mandated to conserve and manage wildlife.³¹ This was decentralisation through

²¹ Ibid Art. V.

²² Sessional Paper No. 3 of 1975, 'Statement On Future Wildlife Management Policy In Kenya'.

²³ Ibid paragraph 6.

²⁴ Ibid Paragrah 9.

²⁵ Cap 376.

²⁶ Patricia Kameri-Mbote 'Aligning Sectoral Wildlife Law to the Framework Environmental Law' in C.O. Okidi *et al.*(eds), *Environmental Governance in Kenya: Implementing the Framework Law* (East Africa Educational Publishers, 2008) 281, 291.

²⁷ Nyeki (n12) 5.

²⁸ Roe *et al.* (n4) 3.

²⁹ (adopted 21 October 1989) < <http://www.kenyalaw.org/treaties/treaties/26/Langkawi-Declaration-on-the-Environment>> accessed 13 December 2012.

³⁰ Article 7.

³¹ Section 3 WCMA.

delegation but despite this positive move, wildlife management remained centralized within KWS.³²

In 1992 Kenya became a signatory to the Convention on Biological Diversity (CBD).³³ One of the objectives of this Convention was the equitable sharing of benefits from biological resources.³⁴ It emphasized area based measures and planning which would be best achieved at local level.³⁵ The world was fast moving towards decentralisation of wildlife management and KWS saw the importance of community participation. In 1992 it established the Community Wildlife Service Department to be responsible for wildlife management outside protected areas.³⁶

In 2000, the 2nd Pan African Symposium on Sustainable Use of Natural Resources in Africa was held.³⁷ One of its key resolutions was that national policies relating to community wildlife management should go beyond community participation to legal empowerment.³⁸ More concise forms of decentralisation were being proposed. In July 2006 the Minister for Tourism and Wildlife appointed a committee and tasked it to review the wildlife policy and law and address the issues of decentralisation.³⁹ The committee came up with the Wildlife (Conservation and Management) Bill in 2007 which underwent several reviews and changes until 2012 when it was presented to and approved by Cabinet.⁴⁰ One of the guiding principles in the Bill is decentralization of wildlife management through devolution.⁴¹ With agitation by communities to have a greater voice in wildlife management and in their move to establish conservancies, KWS

³² Nyeki (n12) 5.

³³ (entered into force 29 December 1993) < <http://www.kenyalaw.org/treaties/treaties/87/Convention-on-Biological-Diversity> > accessed 12 December 2012.

³⁴ Ibid Article 1.

³⁵ Ibid Article 8.

³⁶ Mbote 'Aligning Sectoral Wildlife Law to the Framework Environmental Law' (n26) 291. See also Nyeki (n12) 7.

³⁷ On 24-27 July 2000 in Ouagadougou, Burkina Faso.

³⁸ Bihini Won Wa Musiti (ed), *2nd Pan African Symposium on the Sustainable Use of Natural Resources in Africa* (IUCN, 2003) 2.

³⁹ Mbote 'Aligning Sectoral Wildlife Law to the Framework Environmental Law' (n26) 297.

⁴⁰ October 2012.

⁴¹ Section 5.

has proposed the Wildlife (Conservation and Management) Conservancy Regulations. These come in the wake of the creation of over 120 conservancies countrywide.⁴²

1.3 STATEMENT OF THE PROBLEM

The state owns all wildlife in Kenya and has maintained strong control over wildlife management yet 70% of wildlife exists outside protected areas. Ownership of wildlife is to be distinguished from land ownership whereby communities, local authorities and private individuals may own land on which wildlife resides but the wildlife on it remains the property of the state. Centralization of wildlife management has increasingly led to alienation of wildlife from communities.⁴³ This has in turn led to a general negative perception of wildlife by communities and has inhibited community participation in wildlife management in Kenya.⁴⁴

The Constitution of Kenya provides the legal context within which wildlife resources are managed⁴⁵ and encourages public participation.⁴⁶ This may seem positive with regard to devolution of wildlife management but in the distribution of functions between the two levels of government, the Constitution maintains wildlife management as a function of central government.⁴⁷ In this study, the researcher will seek to illustrate that the existing legal frameworks do not adequately address devolution of wildlife management to communities and that the Wildlife (Conservation and Management) Bill, despite being the future legislation on wildlife management does not adequately address devolution.

The legal issue which this study seeks to address is that wildlife legislation in Kenya does not provide for devolution of wildlife management to communities. This gap has led to ineffective participation of communities in wildlife management which in turn has resulted in negative interaction between communities and wildlife. The government entity mandated to manage

⁴² KWS Community Enterprises Database (2012).

⁴³ Patricia Kameri-Mbote, *Property Rights and Biodiversity Management In Kenya* (Acts Press 2002) 171.

⁴⁴ M. T. Cirelli, *Legal Trends in Wildlife Management* (Legislative Study 74, FAO 2002) 39.

⁴⁵ Mbote 'Aligning Sectoral Wildlife Law to the Framework Environmental Law' (n26) 291.

⁴⁶ Article 69(1)(d).

⁴⁷ 4th Schedule Part I Paragraph 22(b).

wildlife in Kenya which is Kenya Wildlife Service (KWS) has been encouraging communities to manage wildlife found on their land without any backing from the law. This in turn has led to silent devolution of wildlife management.

1.4 HYPOTHESIS

To give the researcher a restricted focus and to direct the attention to the scope of the study the following hypotheses were tested:

1. The legal frameworks in Kenya do not adequately provide for devolution of wildlife management.
2. Communities are discouraged from participating in wildlife management due to legislation that is pro-centralization of wildlife resource management.

1.5 JUSTIFICATION

Wildlife resources contribute directly and indirectly to the local and national economy through revenue generation and wealth creation.⁴⁸ In 2011, KWS generated Kshs. 3.77 billion from wildlife tourism.⁴⁹ Wildlife resources also play a fundamental role in supporting local livelihoods. However due to centralization in Kenya, wildlife is viewed negatively by communities because they see neither actual nor potential benefits from it.⁵⁰ This has led them to adopt conflicting land uses which in turn lead to human wildlife conflicts. In 2011, Kshs. 109,600,000 was spent on compensation to communities for damages caused by wildlife.⁵¹ There has also been a rise in wildlife poaching outside protected areas. In 2011, 81 and 82 percent of rhino and elephant poaching respectively took place outside protected areas.⁵²

It has often been argued that wildlife management in Kenya has been practiced at two levels, that is National and local authority level with examples of management of Maasai Mara National Reserve being managed by Narok County Council cited. This, however, cannot be said to be

⁴⁸ Mbote 'Aligning Sectoral Wildlife Law to the Framework Environmental Law' (n26) 281.

⁴⁹ Kenya Wildlife Service, *KWS Annual Report and Financial Statements 2011* (KWS, 2012) 35.

⁵⁰ Roe *et al.* (n4) 124.

⁵¹ Kenya Wildlife Service, *KWS Annual Report and Financial Statements 2011* (n49) 36.

⁵² Ibid 1.

devolution of wildlife management because under Section 18(5) of the WCMA, persons are prohibited from establishing National Reserves without the consent of the Minister. Further under Section 3A(c) of the WCMA, KWS is given the overall responsibility of management of all National Parks and National Reserves. The ownership of the wildlife is distinguished from the ownership of the land whereby the local authorities were empowered under the Local Government Act to manage trust land which includes National Reserves on behalf of the people in their jurisdiction whereas the wildlife thereon remained the property of the national government.

It is therefore to be found that in most National Reserves, KWS is responsible for the key management aspects of wildlife including research, security and population control whereas the local authority remains responsible for tourism and collection of revenue. The WCMB seeks to further centralize the management of wildlife by providing in Section 109(a) that all National Reserves will be renamed National Parks which are to be managed by KWS as provided for under Section 8(a).

Communities have been discontent with the centralization of wildlife management by the law and have sometimes resorted to the judicial process to assert their rights to participate in wildlife management. In *Galana & 3 Others v AG & 2 Others*⁵³ the Ndera and Gwano communities of Tana River went to court seeking to quash the gazette of Tana Primate Reserve and restrain KWS from interfering with the wildlife within their locations. The court in its decision dwelt on the issue of gazette of Tana Primate Reserve and quashed the gazette notice declaring it as such but made no orders on the interference of wildlife in the area by KWS. In *Hassan & 4 Others v KWS*⁵⁴ the Arawale community in Garissa disputed a decision by KWS to translocate the endangered hirola antelope from Arawale on the ground that they were a natural gift to the community. The Court held that KWS would be acting outside its powers if it were to translocate the antelopes away from their natural habitat without express consent from the community.

⁵³ [2007] eKLR.

⁵⁴ (1996) 1KLR (E&L).

More recently, communities have been creating wildlife conservancies on their land despite there being no legislation recognizing them. In December 2012, like minded conservancy owners came together in Nairobi and held discussions on the formation and registration of an association of conservancies to be known as Kenya Wildlife Conservancies Association to help shape the destiny of wildlife outside protected areas.⁵⁵ This Association has since been created and was registered in April 2013.

This shows that communities in Kenya are aware of their role in wildlife management. It is the legal frameworks that hamper their complete participation and benefitting from wildlife management by failing to provide for devolution. KWS recognizes that communities play a crucial role in wildlife management and according to Hon. David Mwiraria⁵⁶ KWS no longer wants to be seen as an authority that coerces communities into cooperation in wildlife management but as a conservation partner.⁵⁷

1.6 SCOPE

The researcher's study is limited to KWS as the government entity responsible for wildlife management and KWCA representing communities living with wildlife. A case study is also done of IHCC which is a member of KWCA. Legislatively, the researcher's study shall be limited to the Constitution of Kenya and the WCMA. The study shall also look at proposed legislation including the Wildlife (Conservation and Management) Bill, 2013 and the draft Community Land Bill, 2012.

1.7 CONCEPTUAL FRAMEWORK

This study is based on the notion that communities will have little interest in wildlife management if they are not allowed to fully participate in it and participation is best achieved if wildlife management is devolved to community level. This study is therefore based on the concept that there are levels of decentralization, some of which lead to greater transfer of powers

⁵⁵ Kenya Wildlife Service, 'Newly Formed Wildlife Sector Stakeholders' Body to Galvanize Industry Governance' (KWS.org 2012) <http://www.kws.org/info/news/2012/03_12_12_conservationists.html> accessed 13 December 2012.

⁵⁶ Chairman, KWS Board of Trustees.

⁵⁷ Kenya Wildlife Service, *KWS Annual Report and Financial Statements 2011* (n49) vi.

to local levels than others. Deconcentration leads to the least transfer of power and authority while devolution leads to the greatest levels of transfer of power to local levels.⁵⁸

Another legal concept upon which this study is based is the new governance concept. This concept advocates for decentralization and challenges the traditional focus on formal regulation as the dominant locus of change.⁵⁹ New governance is facilitated by such factors as devolution, increased public-private partnerships and the emergence of new managerial technologies.⁶⁰ Many policy initiatives in different fields are now employing new regulatory approaches in legal practice that reflect this concept.⁶¹ One such field is Environmental law.

Environmental law has been at the forefront of new governance through the concept of civic environmentalism, which confronts the failures of traditional regulatory schemes and promotes participatory and decentralized arrangements to better conserve the environment and natural resources. The new governance approach of civic environmentalism aims to be participatory, collaborative and decentralized and focuses on problem solving.⁶² As such, policies must be integrated to allow those closest to the problem to contemplate their effectiveness and reasonableness. Government restricts its role to assisting in and providing incentives for self-implementation programs and encourages public participation.⁶³

1.8 LITERATURE REVIEW

1.8.1 COMMUNITY PARTICIPATION IN WILDLIFE MANAGEMENT

Several authors have investigated the participation of communities in wildlife management in Kenya. Mbote posits that the state should divest itself of the rights to and control over wildlife

⁵⁸ Rondinelli, Nellis and Cheema (n15) 14.

⁵⁹ Orly Lobel, 'The Renew Deal: The Fall of Regulation and Rise of Governance in Contemporary Legal Thought' (2004) 89 Minnesota Law Review 262, 264

⁶⁰ David M. Trubek and Louise G. Trubek, 'New Governance and Legal Regulation: Complementarity, Rivalry and Transformation' (2006) 13 Columbia Journal of European Law 1, 4

⁶¹ Lobel (n59) 263.

⁶² Ibid 345.

⁶³ Ibid 346.

resources and devolve ownership, control and management of wildlife resources to individuals and local authorities. It is her argument that there should be a removal of government involvement in the affairs of communities.⁶⁴ In another work, jointly with Odote, Musembi and Kamande, Mbote looks at community participation from the angle of community property in Kenya. It is these scholars' view that the last critical resource within communities in Samburu Kenya is wildlife. They observe that the claims asserted by communities to land and land based natural resources are currently not recognized at all or given inadequate recognition. They conclude that the absence of documentation of community rights has undermined their strength.⁶⁵

Wasonga, Kambewa and Bekalo take the same position and state that community participation in natural resource management balances the exploitation and conservation of ecosystem components through some degree of devolution of decision making, power and authority over natural resources. Successful community participation requires decision making authority to be at their level.⁶⁶ Saito looks at community participation from the perspective of Uganda. He deems decentralized wildlife management as more appropriate for facilitating community conservation.⁶⁷ UNEP looks at community participation from an international perspective. It is their contention that the CBD recognizes the close and traditional dependence of many indigenous and local communities on biological resources.⁶⁸

These works are important to this study as they place community participation at the centre of wildlife management in various jurisdictions, including Kenya. They also highlight the disadvantages communities face when management of wildlife resources is centralized in the national government. The gap in this literature is that it gives broad perspectives and does not look at the legal frameworks in Kenya as being key instruments that result in centralization of wildlife resources, thus inhibiting community participation.

⁶⁴ Mbote, *Property Rights and Biodiversity Management In Kenya* (n43).

⁶⁵ Patricia Kameri-Mbote *et al.*, *Ours by Right: Law, Politics and Realities of Community Property in Kenya* (Strathmore University Press, 2013).

⁶⁶ Wasonga, Kambewa and Bekalo (n5) 165.

⁶⁷ Saito (n16).

⁶⁸ UNEP, *Training Manual on Environmental Law* (UNEP, 2006).

1.8.2 CONCEPTUALIZING DEVOLUTION

Devolution is a complex and wide subject with different connotations and meaning across time and space. It is often conceptualized as a sub-category or level of decentralization. Rondinelli, Nellis and Cheema define decentralization as having three levels; deconcentration, delegation and devolution. They define deconcentration as the handing over of administrative responsibility to lower levels within central government, delegation as being the transfer of managerial responsibility for specifically defined functions to organisations that are only indirectly controlled by central government and devolution as the strengthening of sub-national units of government which are outside the direct control of central government.⁶⁹

According to Odera, devolution is a form of decentralization in which the authority for decision making in respect to finance and management is transferred to quasi-autonomous units of local government. For him, devolution is a political concept that denotes the transfer of political, administrative and legal authority, power and responsibility from the centre to lower levels.⁷⁰ Cirelli takes a similar position on transfer of powers to local levels of government, albeit focusing on the environmental sector. He observes that there has been a growing tendency towards the devolution of powers of central government in the environmental sector to local authorities. It is his argument that increased devolution of power to the local level may facilitate adequate consultation of communities.⁷¹

These three works are important to this study to the extent that they discuss the meaning and importance of devolution and its place in the decentralization of governments. The gap in this literature is that it focuses on legal, political and economic devolution to local government. It does not look at devolution of wildlife management or at transfer of devolved functions to communities.

⁶⁹ Rondinelli, Nellis and Cheema (n15).

⁷⁰ Steve O. Odera 'Devolved Government', in PLO Lumumba et al., *The Constitution of Kenya: Contemporary Readings* (Law Africa Publishing (K) Ltd., 2011) 203.

⁷¹ Cirelli (n44).

Other scholars look more specifically at devolution of wildlife management. Dilys Roe et al. (eds) posit that there is increasing focus on devolution and on creating local level conservation responsibility. Devolution for them is the way forward for natural resource management in many countries.⁷² Nelson and Agrawal make a case for devolution of wildlife management as an approach to improving conservation of wildlife in Kenya. They argue that for decentralisation to be effective, it should promote the rights to use wildlife by Kenyans.⁷³

These two works are important to this study in that they look specifically at the devolution of wildlife management to community levels. The gap in this literature is that it does not provide for the mechanisms of the said devolution through legal frameworks.

1.8.3 PRACTICES IN WILDLIFE MANAGEMENT WITH RESPECT TO DEVOLUTION

Various scholars have looked at practical applications of devolution in wildlife management. Guthiga and Ogada discuss the results of a case study of Mwaluganje Sanctuary to show that devolution of wildlife management is taking place in Kenya.⁷⁴ They conclude that devolution of natural resource management and engagement of communities is already in progress.⁷⁵ Shackleton and Campbell carry out a similar study in Southern African countries to show the importance of effective devolution for community participation. They observe that an effective policy framework is essential for effective devolution and that those countries with policies that devolve authority and transfer proprietary rights over natural resource management to users have more effective initiatives that are viewed positively by communities. They also observe that a lack of commitment by the state to release power to communities limits success of community participation.⁷⁶

⁷² Roe *et al.* (n4).

⁷³ Fred Nelson and Arun Agrawal, 'Patronage or Participation? Community-based Natural Resource Management Reform in Sub-Saharan Africa' (2008) 39(4) *Development and Change* 557 -585.

⁷⁴ Paul Guthiga and Maurice Ogada, 'Harnessing Proposed Land Reforms to Promote Environmental Conservation in Kenya: Lessons from The Case of Mwaluganje Elephant Sanctuary and Hombe Community Forest Association' (2012) Land Development and Governance Institute Research Paper.

⁷⁵ Ibid.

⁷⁶ Shoena Shackleton and Bruce Campbell, *Devolution in Natural Resource Management; Institutional Arrangement and Power Shifts - A Synthesis of Case Studies from Southern Africa* (CIFOR, 2001).

This literature is important to current study in that it shows practical results of areas where devolution has resulted in positive outcomes. It also brings out the fact that devolution of wildlife management must be accompanied by community involvement and understanding of the entire process for it to be accepted and owned by communities. The gap in this literature is that it does not inform on the legal frameworks on devolution of wildlife management. Legal frameworks are not part of what is analysed to show how their provisions on devolution have impacted on successes in the case studies.

1.9 OBJECTIVES OF THE RESEARCH

1. To critically examine the legal frameworks on wildlife management in Kenya to establish whether or not they provide for devolution.
2. To evaluate the different levels of decentralisation and assess the inclusion of devolution in Kenyan wildlife management legislation.
3. To examine whether communities fully participate in wildlife management within the subsisting legal frameworks.
4. To make recommendations for legislation on devolution of wildlife management in Kenya that would result in benefits to communities.

1.10 RESEARCH QUESTIONS

1. What are the legal frameworks on devolution of wildlife management in Kenya, if any?
2. What are the different levels of decentralisation and to what extent is devolution included in the legal frameworks on wildlife management as the greatest form of decentralization?
3. Are the subsisting legal frameworks on devolution of wildlife management, if any, effective in encouraging participation of communities?
4. What recommendations should be made to encourage participation of communities in wildlife management?

1.11 METHODOLOGY

In this study the researcher relied on one main methodology which is review of Literature – the researcher gathered and analyzed information from published works, public documents and statutes, from library and internet sources and archived data.

1.12 CHAPTER BREAKDOWN

Chapter 1 – Introduction

The introductory chapter describes the topic to be investigated and also details the processes that have been followed during the investigation.

Chapter 2 –Kenyan legal frameworks on devolution of wildlife management

This chapter makes a detailed assessment of what the legal frameworks on decentralisation in general and devolution in particular of wildlife management are in Kenya today. It shall interrogate the Constitution, WCMA, the Wildlife (Conservation and Management Bill), 2013 and the proposed Community Land Bill, 2013.

Chapter 3 – Conceptualizing Devolution of wildlife management in Kenya

This chapter delves into the general concept of decentralization and specifically devolution as one category or decentralization and the Kenyan experience of decentralization. It describes the meaning of wildlife management and looks at what devolution of wildlife management should entail from the general concept. It also distinguishes between devolution and public participation.

Chapter 4 – Do current practices in wildlife management in Kenya indicate silent devolution? A case study of Ishaqbini Hirola Community Conservancy

This chapter seeks an understanding of how communities participate in wildlife management in Kenya today, and whether or not their participation leads to silent devolution.

Chapter 5 –Findings, Conclusions and Recommendations

This chapter outlines the results of the research, gives the conclusions on the findings and propose recommendations based on the findings.

CHAPTER 2

KENYAN LEGAL FRAMEWORKS ON DEVOLUTION OF WILDLIFE MANAGEMENT

2.1 INTRODUCTION

Legislation on wildlife management in Kenya came with the advent of colonialism. It was mostly geared towards preservation of wildlife and had one of its goals as separating humans from wildlife. On gaining independence, Kenya retained the colonial wildlife ideology and practice. Kenyan leaders publicly advocated for the merit of wildlife preservation and preached wildlife conservation as a national duty.⁷⁷ The reality was that wildlife was viewed as one of the keys to economic growth and stability in the young state. With this focus, the government took upon itself the full responsibility of formulating policies and legislation to conserve wildlife and communities hosting wildlife were merely to be informed of their roles.⁷⁸ Wildlife policies and legislation at the time ignored the construction of direct linkages between people and wildlife which would have been achieved by devolving wildlife management to communities.⁷⁹

Wildlife is a fugitive resource and does not recognize property boundaries.⁸⁰ It is migratory in nature and travels over long distances in search of forage and water and traverses both private and community land. Wildlife movement therefore cannot be restricted to national parks and reserves.⁸¹ The fugitive nature of wildlife poses questions of both wildlife security when they move into insecure areas and human security especially in cases of human wildlife conflicts (HWC). Communities end up hosting wildlife on their land and need to participate in its management for them to realize benefits from such wildlife.

⁷⁷ Ngeta Kabiri, 'Global Governmental Governance and Community Based Conservation in Kenya and Tanzania' (DPhil Thesis, University of North Carolina 2007) 171.

⁷⁸ Ibid 174.

⁷⁹ Nobuko Nishizaki, 'Community-Based Anti-Poaching Effort: A Case Study of the Mago National Park Ethiopia' in Toshio Meguro (ed) *Reconceptualization of Wildlife Conservation: Towards Resonance Between Subsistence and Wildlife* (Acts Press, 2008) 57, 64.

⁸⁰ Mbote, *Property Rights and Biodiversity Management In Kenya* (n43) 29.

⁸¹ Ibid.

This chapter will look at legislative frameworks in Kenya to discover the extent to which they do or do not provide for devolution of wildlife management to communities. There are various laws that touch on wildlife including laws dealing specifically with wildlife, laws dealing with the areas in which wildlife is found, such as the land use and land tenure laws, local government laws and zoning laws.⁸² The focus of this research is on ownership of the wildlife resource and not the land on which it resides and therefore will not go into deep analysis of land laws.

This chapter will focus on the Constitution of Kenya, 2010 as the supreme law of the land giving guidelines on general conservation principles, the Wildlife (Conservation and Management) Act⁸³ being the law that specifically governs wildlife and the Wildlife Conservation and Management Bill, 2013⁸⁴ being the proposed future legislation that will govern wildlife management in Kenya. It will also be important to look at the Draft Community Land Bill, 2011 as it is the land tenure by which it is anticipated that communities will manage wildlife resources.

2.2 HISTORY OF WILDLIFE LEGISLATION IN KENYA

During the colonial period, various Ordinances were enacted to regulate access to and utilization of wildlife. The Game Ordinance⁸⁵ of 1898 marked the beginning of legislative control over wildlife in Kenya. Between 1900 and 1945, the colonial government enacted many fragmented game regulations and ordinances.⁸⁶ Policy and legislation on wildlife focussed mainly on control of hunting and regulation of possession and trade of wildlife trophies. The Proclamation Order of 1917, for example, introduced hunting permits and licenses which were to be issued on payment of a fee.⁸⁷

⁸² Mbote 'Aligning Sectoral Wildlife Law to the Framework Environmental Law' (n26) 281.

⁸³ Cap 376 Laws of Kenya.

⁸⁴ Kenya Gazette Supplement No. 107 (National Assembly Bills No. 21).

⁸⁵ No. 4 of 1898.

⁸⁶ George Oduor Ndege, 'Tourism in Kenya: Genesis, Growth and Impact' in William Robert Ochieng' and Robert M. Maxon (eds) *An Economic History of Kenya* (East African Publishers, 1992) 327, 328.

⁸⁷ Ibid.

The Game Preservation Proclamation of 1920 provided that ‘natives’ could not be granted a game license of any nature without express permission from the Governor.⁸⁸ The 1921 Game Ordinance put tighter controls on game hunting and expanded wildlife reserves.⁸⁹ In 1945, there were policy shifts which focussed on protection of wildlife through the protected area concept and the vesting of all wildlife resources in the government. The National Parks Ordinance⁹⁰ was enacted. For the first time, the colonial government started addressing wildlife management issues from the point of view of wildlife security and HWC.

Post independence, the first attempt at a comprehensive policy review on wildlife management in Kenya was proposed in 1975 due to the dwindling of wildlife resources. The Government then issued Sessional Paper No. 3 of 1975.⁹¹ This policy was a radical departure from preservationist policies preceding it. It recognised that wildlife needed space outside protected areas.⁹² Although this is the policy that is still in use today, wildlife utilization remains prohibited and where it is allowed, through game farming, it is burdened by strict regulation and supervision. The main statute that provides for wildlife in Kenya is the WCMA which was enacted in 1976 with major amendments in 1989.⁹³ The key objectives of the WCMA are the protection, conservation and management of wildlife.

2.3 THE CONSTITUTION OF KENYA, 2010

The Constitution is the supreme law of Kenya. The legal context for any activity including management of wildlife resources must conform to constitutional provisions. The laws enacted by the colonialists, many of which are still in force today, achieved total state control over wildlife resources.⁹⁴ The independence Constitution did not specifically provide for wildlife

⁸⁸ John. M. MacKenzie, *The Empire of Nature: Hunting, Conservation and British Imperialism* (Manchester University Press, 1997) 312.

⁸⁹ Colony and Protectorate of Kenya, *Colonial Reports – Annual: Report for 1921* (His Majesty’s Stationery Office, 1923) 28.

⁹⁰ No. 9 of 1945.

⁹¹ Statement on Future Wildlife Management Policy in Kenya.

⁹² Mbote ‘Aligning Sectoral Wildlife Law to the Framework Environmental Law’ (n26) 291.

⁹³ Wildlife (Conservation and Management) (Amendment) Act No. 16 of 1989.

⁹⁴ Mbote, *Property Rights and Biodiversity Management In Kenya* (n43) 100.

management and Kenya at independence, in a bid to consolidate and centralize national land and local administrative functions, assumed ownership powers over all natural resources including wildlife. The result was the uncertainty of community rights of control and access to the resources.⁹⁵

The promulgation of the CoK in 2010 was a much needed change for Kenya. It was a move away from a Constitution dictated to the people to a Constitution owned by the people. In the CoK, Kenyans now have a constitutional direction on environmental issues that directly affect wildlife management. The preamble to the CoK is instructive on this and states, ‘...Respectful of the environment, which is our heritage, and determined to sustain it for the benefit of future generations...’

At first glance the CoK seems to embrace the new governance concept by providing for participatory and decentralized arrangements to better conserve natural resources including wildlife. Article 10, for example, provides for national values and principles of good governance which include sharing and devolution of power, participation of the people⁹⁶ and inclusiveness.⁹⁷ Article 69(1)(d) of the CoK reemphasizes this position by obliging the State to encourage public participation in the management of the environment. Public participation is a key aspect of wildlife management because it allows communities to express their views on key governmental policies and laws.⁹⁸

The main aspect of the concept of public participation is the involvement of those who are affected by a decision in the decision making process.⁹⁹ According to Creighton, public participation relates to administrative decisions and not decisions made by elected officials and

⁹⁵ Ibid.

⁹⁶ Sub-Article (2)(a).

⁹⁷ Sub-Article (2)(b).

⁹⁸ Marianela Cedeño et al., *Environmental Law in Developing Countries: Selected Issues* (IUCN, 2004) 7

⁹⁹ International Association for Public Participation, 'Good Public Participation Results in Better Decisions' (iap2.org 2013) <<http://www.iap2.org/>> accessed 3 August 2013

judges.¹⁰⁰ In light of the provisions of the Fourth Schedule to the CoK that protection of wild animals is a function of the national government¹⁰¹, it can be perceived that the provisions of Articles 10 and 69(1)(d) of the CoK will only apply to the extent of communities participating in the decisions of the administrative agency of the national government mandated to protect and manage wildlife. Communities are not making the decision with respect to wildlife management themselves but are only participating in an administrative process where decisions made will affect them. The constitutional provisions that the state will encourage public participation therefore only ensures that communities' views are taken into account when making decisions relating to wildlife management to the extent that those decisions will affect them.

It therefore becomes clear that a deeper interrogation of these provisions read holistically with the entire CoK unravels a totally different position. Despite the purported intentions of the CoK from the provisions discussed above, the national government has generally retained all management rights over wildlife.¹⁰² According to Cirelli, the best way in which communities can greatly benefit from wildlife resources is through devolution of wildlife management to the lowest levels possible.¹⁰³ The law should endow communities with powers to manage and make decision on management of wildlife on their land with the state only playing a supervisory role.¹⁰⁴

The CoK provides for devolution of powers and functions to lower levels of government known as Counties.¹⁰⁵ One of the objects of devolution is to enhance the participation of the people in the exercise of the powers of the State.¹⁰⁶ Article 186 of the CoK provides for the powers and functions of the national and county governments which are then listed in more detail in the

¹⁰⁰ James L. Creighton, *The Public Participation Handbook: Making Better Decisions Through Citizen Involvement* (John Wiley & Sons, 2005) 8.

¹⁰¹ Part 1 Paragraph 22(b).

¹⁰² Clark C. Gibson, *Politics and Poachers: The Political Economy of Wildlife Policy in Africa* (Cambridge University Press, 1999) 143.

¹⁰³ Cirelli (n44) 58.

¹⁰⁴ Ibid.

¹⁰⁵ Article 6.

¹⁰⁶ CoK Article 174(c).

fourth schedule to the CoK. This schedule provides that protection of animals and wildlife is a function of the national government.¹⁰⁷ It does not talk about who has the responsibility for ‘management’. Article 186(4) clarifies the ambiguity by stating that a function or power not assigned by the CoK or national legislation to a county is a function or power of the national government. Further the fourth schedule provides that it is a function of county government to implement national government policies on natural resources¹⁰⁸ and environmental conservation.¹⁰⁹

These constitutional provisions create a situation which is not consistent with devolution of wildlife management to local communities.¹¹⁰ To the contrary, they entrench state control of wildlife. Communities, acting through their county governments, are left with the duty to implement government policies on wildlife management. Custodianship of wildlife as well as authority for management is retained by the national government.¹¹¹ Opportunities for participation by local communities are thus weakened as opposed to being strengthened by the CoK.

2.4 THE WILDLIFE (CONSERVATION AND MANAGEMENT) ACT (CAP 376) LAWS OF KENYA

The Principle legislation on wildlife management in Kenya is the Wildlife (Conservation and Management) Act.¹¹² The introduction to the Act states that it is an Act of Parliament to consolidate and amend the law relating to the protection, conservation and management of wildlife in Kenya. This law was enacted in 1976¹¹³ with major amendments done in 1989. It is the law that is supposed to define the roles of the state and communities in management of wildlife resources in Kenya.

¹⁰⁷ CoK 4th Schedule Part 1 Paragraph 25.

¹⁰⁸ Article 260 of the CoK defines natural resources to include biodiversity and genetic resources.

¹⁰⁹ Part 2 Paragraph 10.

¹¹⁰ Kabiri (n77) 176.

¹¹¹ David Western and John Waithaka, ‘Policies for Reducing Human Wildlife Conflict: A Kenya Case Study’ in Simon Thirgood and Allan Rabnowitz (eds) *People and Wildlife: Conflict or Coexistence* (Cambridge University Press, 2005) 357, 366.

¹¹² Cap 376 Laws of Kenya.

¹¹³ The commencement date is 13th February 1976.

The WCMA is based on the Wildlife Policy of 1975. The policy in paragraph 14 provides for the creation of a Wildlife Service which is to be responsible for implementation of all aspects of wildlife management as are to be provided for in the Act. The policy justifies the creation of such a Service in paragraph 15 by stating that the centralization of responsibility with regards to wildlife management will provide for more flexible management of wildlife especially in areas with high concentration of wildlife such as National Parks and County Council Game Reserves. One important aspect that the Policy provided for that was largely ignored by the WCMA was the move away from the preservationist approach to wildlife management. Sustainable conservation is a better approach canvassed by the Policy which will encourage communities to participate in wildlife management due to direct benefit from utilization of wildlife in a manner that ensures that species populations are not depleted.

On the basis of the Policy, the preamble of the WCMA states, inter alia, ‘Whereas it is desirable that the present powers relating to the management and conservation of wildlife in Kenya should be amalgamated and placed in a consolidated Service of the Government...’ This is the opening statement that gives an overview of the legislation and already, it is clear that the focus of this Act is on centralization of the wildlife management in the state.

Section 3 provides for the establishment of a uniformed and disciplined Service to be known as Kenya Wildlife Service which shall be responsible for wildlife conservation and management in Kenya. This essentially is delegation of wildlife management functions by the state to a state corporation. The Director of KWS as well as the Chairman of the KWS Board of Trustees are to be appointed by the President without consultation or the approval of parliament. This demonstrates how much control the government intended to have over wildlife management in Kenya.

Section 5B of the Act attempts to involve communities in the management of wildlife by providing for the establishment of Wildlife Advisory Councils (WAC) in areas where national parks and national reserves are situated. The function of these WACs is to bring to the notice of

the Board of Trustees all problems and other matters relating to wildlife conservation and management relating to their respective areas.¹¹⁴

However, this provision that would have enhanced community participation in wildlife management is diluted within the same breath. Section 5B provides that the appointment of members the council shall be by the KWS Board of Trustees. It does not give an opportunity to the locals to make the decision on who among them should be members of these Councils. Further, the Act provides that ‘An advisory council shall not take part in the day-to-day business of wildlife conservation and management...’¹¹⁵ Therefore, though purporting to provide for community participation, the law is actually limiting such participation. It is also interesting to note that the Board of Trustees has never exercised this power and therefore no Wildlife Advisory Councils exist.

Sections 6, 18 and 19 provide for creation of national parks, national reserves and sanctuaries respectively. The power to do so is vested in the Minister (now Cabinet Secretary) in consultation with the ‘competent authority’. The Act defines ‘competent authority’ to mean the landowner or person with authority to control or manage the land on which the wildlife is found.¹¹⁶ Local authorities under the former constitutional regime managed wildlife on trust land which they held on behalf of the communities in their jurisdictions. However, the wildlife remained the property of the national government which had merely delegated the management of the wildlife to the local authority.

Communities are neither involved nor consulted in the creation of protected areas and this has led to hostilities between the government and communities. One such dispute is in *Republic v Minister for Forestry and Wildlife and 2 Others Ex Parte Charles Odera and 5 Others*.¹¹⁷ In this case, the Minister of Forestry and Wildlife in 2010 gazetted¹¹⁸ a portion of Usonga Yala

¹¹⁴ Section 5B(3).

¹¹⁵ Ibid.

¹¹⁶ Section 2.

¹¹⁷ Kisumu High Court Miscellaneous Application No. 55 of 2010 [2012] eKLR.

¹¹⁸ Legal Notice No. 158 of 2010.

Swamp to be a National Reserve known as Lake Kanyaboli National Reserve. It was the contention of the community that such gazettelement was done without their consent. The community therefore brought an action in judicial review seeking an order of certiorari to quash the decision of the minister. The court held that the community had indeed not been consulted and quashed the gazette notice creating Lake Kanyaboli National Reserve.

The WCMA does not provide for community wildlife conservation areas of any kind. In fact, the Act prohibits the establishment of any game reserve or national reserve except with the approval of the minister.¹¹⁹ This is a clear demonstration on how the WCMA intends to disenfranchise the communities from participation in wildlife management. The law does not even allow one to establish a wildlife protected area on their own land and yet it purports to encourage conservation of wildlife resources in Kenya.

Section 57A(2)(b) of the WCMA makes it the responsibility of KWS to mitigate human wildlife conflict. Section 62 provides for compensation for personal injury or death caused by wildlife. This section creates a District Compensation Committee comprising national government officer at the District level to receive and consider applications for compensation. These provisions prevent the devolution of conflict mitigation measures to the communities.¹²⁰ According to Western and Waithaka, centralization of conflict resolution and compensation creates dependency and local inaction.¹²¹ It is the intention of the law to vest all decision regarding conflict mitigation and compensation in the national government with no decision making powers on conflict mitigation left with the communities.

The WCMA is an old piece of legislation and does not reflect modern concepts such as the new governance concept. This Act reflects the intentions of the state to bring the wildlife estate under its sway.¹²² What is revealed from the Act is a desire towards centralization rather than

¹¹⁹ Section 18(5).

¹²⁰ Western and Waithaka (n111) 366.

¹²¹ Ibid.

¹²² Kabiri (n77) 177.

devolution of wildlife management.¹²³ The state has merely delegated its powers of wildlife management to a state corporation of which it has control. Claims by KWS that it has devolved wildlife management to the counties are mere rhetoric.¹²⁴ What it has done is to deconcentrate its services to county level.

2.5 PROPOSED LEGISLATION

2.5.1 THE REVIEW OF THE WCMA

As stated in the previous section, it is clear that the WCMA is an old piece of legislation and does not address the dynamism of wildlife management today. The process of reviewing the WCMA began in the 1990's and to date no new legislation has been enacted. Political and conflicting stakeholder interests are some of the issues that have led to the delays in reviewing wildlife legislation in Kenya.

The first attempt to revamp the WCMA was the Wildlife (Conservation and Management) Bill, 1997. This Bill proposed public participation through wildlife user rights to land owners, a national wildlife association and zonal wildlife associations. It, however, did not see the light of day. The next attempt was in 2004 via the Wildlife (Conservation and Management) (Amendment) Bill. The prevailing themes in this Bill were consumptive utilization of wildlife, reintroduction of sport hunting and enhanced compensation for loss of life and injury caused by wildlife. The Bill went through Parliament but was vetoed by the President.¹²⁵

A third attempt came in 2007 with the Wildlife (Conservation and Management) Bill. This Bill also emphasized community participation by providing for community wildlife conservation areas and sanctuaries, constituency wildlife associations and wildlife user rights. This Bill did not reach parliament. In 2009, a fourth attempt was made to overhaul wildlife legislation with

¹²³ Ibid.

¹²⁴ Kenya Wildlife Service, 'Kenya Wildlife Service Statement on the Status of Wildlife Conservation' (www.kws.org 2013) <<http://www.kws.org/info/news/2013/13juneconserve2013.html>> accessed 7 July 2013.

¹²⁵ John S. Akama 'Controversies Surrounding the Ban on Wildlife Hunting in Kenya: A Historical Perspective' in Brent Lovelock (ed), *Tourism And The Consumption of Wildlife: Hunting Shooting and Sport Fishing* (Routledge, New York, 2008) 73, 85.

the Wildlife (Conservation and Management) Bill, 2009. This Bill was merely a restatement of the 2007 Bill. The key changes were in the administration of wildlife management by the creation of many state corporations to manage different aspects of wildlife. With the promulgation of the CoK in 2010, the Bill was taken back to the Ministry for purposes of alignment with the provisions of the new constitution.

The next attempt was the Wildlife Bill, 2011 which was supposedly a realignment of the 2009 Bill with the Constitution. It ended up being a restatement of the 2009 Bill with provisions regarding new constitutional issues especially community participation and devolution. This Bill also, did not see the light of day. The sixth attempt was with the Wildlife Conservation and Management Bill, 2012. This Bill restated most of the aspects in the 2009 and 2011 Bills. The Bill was brought before the previous Cabinet where it was approved and sent to the AG where it remained until May 2013. In May 2013, it was brought before the new cabinet with a few changes by the AG. It was approved by Cabinet¹²⁶ and was published on 22nd July 2013.¹²⁷ This is the version of the Bill that will be investigated in this chapter.

2.5.2 THE WILDLIFE CONSERVATION AND MANAGEMENT BILL, 2013

A discussion on the legislative frameworks on wildlife management will not be complete without analyzing the provisions of the WCMB to determine whether or not it provides for devolution of wildlife management to communities. The preamble to the Bill states that it is an Act of Parliament to provide for the protection, conservation, sustainable use and management of wildlife in Kenya and for connected purposes. The Bill shall apply to all wildlife resources on public, community and private land.¹²⁸ The Bill provides that the general principles that shall guide its implementation are, *inter alia*, devolution and public participation.¹²⁹ These preliminary sections of the Bill paint a rosy picture of devolution of wildlife resources to communities.

¹²⁶ Paula Kahumbu, 'Kenya Overhauls Wildlife Laws Following Rise in Elephant and Rhino Deaths' (theguardian.co.uk 2013) <<http://www.guardian.co.uk/environment/africa-wild/2013/jun/07/kenya-wildlife-laws-elephant-rhino-deaths>> accessed 7 July 2013.

¹²⁷ Kenya Gazette Supplement No. 107 (National Assembly Bills No. 21).

¹²⁸ Section 2.

¹²⁹ Section 4.

In the institutional framework, the Bill provides for a Board of Trustees to manage KWS.¹³⁰ Subsection (2) thereof outlines the membership to the Board of Trustees which includes seven members from national government bodies, one member from the tourism sector, one member from NGO's, one member from community managed wildlife areas and one member from privately managed wildlife areas. Communities have only one representative and therefore cannot make much impact in the decisions of the Board on wildlife management.

The Bill maintains KWS as the key body responsible for wildlife conservation and management in Kenya. It provides that one of the functions of KWS includes setting up of County Wildlife Conservation Committees (CWCC).¹³¹ The Bill in this way ensures that the state oversees the creation of purported community bodies with various wildlife management responsibilities to blind the people into thinking that wildlife management rights have been devolved to their level.¹³² In this scheme of things, the question of devolution of wildlife management to communities can only be entertained by the state on its own terms.¹³³

A further study of the CWCC reveals that the membership consists of five persons from national government agencies, one representative of county government and four members from the community.¹³⁴ The Chairman is to be appointed by KWS. This gives KWS an edge and control over the decisions of the CWCC as the Chairperson owes his allegiance to KWS. Another point of concern is if KWS fails to appoint CWCC's just like the Board of Trustees under the current Act have failed to ever appoint Wildlife Advisory Councils. The CWCC in effect therefore only exercises delegated authority and functions from KWS.¹³⁵

¹³⁰ Sections 9.

¹³¹ Section 8

¹³² Cirelli (n44) 53.

¹³³ Kabiri (n77) 174.

¹³⁴ Section 24.

¹³⁵ Functions of CWCCs are in Section 25 of the Bill.

Some provisions of the Bill are quite progressive in attempting to encourage community participation. For example, it provides that any person or community who own land that has wildlife may establish a conservancy or sanctuary.¹³⁶ This is a positive move away from the WCMA which does not even provide for community conservation areas. The WCMB further provides that communities may establish Community Wildlife Associations (CWAs)¹³⁷ which are intended to advance community participation in wildlife management. According to the Bill, the objectives for which these associations are to be formed are to facilitate conflict resolution and cooperative management of wildlife within a specified geographic region.¹³⁸

However, the WCMB also provides that no person shall undertake any wildlife user activity including wildlife based tourism, educational purposes and commercial photography and filming otherwise than under and in accordance to the terms and conditions of a license or permit issued by KWS.¹³⁹ It requires persons wishing to undertake non-consumptive wildlife utilization to register with the CWCC and then obtain a permit from KWS.¹⁴⁰ Section 46 of the Bill further provides for management plans in respect of management of PA's including community conservancies. These management plans are to be formulated by KWS in consultation with the CWCC. The place of the wildlife associations in which communities are expected to have greater decision making powers is diminished. Another aspect by which the WCMB seeks to centralize wildlife management is by the provision of its Section 109 that seek to categorise all National Reserves as National Parks and place them under the management of KWS thereby taking away the previous rights of local authorities to manage wildlife.

These provisions of the Bill have the effect of creating several bureaucratic layers and over-regulation that will eventually lead to communities opting not to create conservancies and sanctuaries due to the red-tape. According to Kabiri, when regulatory activities are introduced,

¹³⁶ Section 41

¹³⁷ Section 97(1).

¹³⁸ Section 97(2).

¹³⁹ Section 66.

¹⁴⁰ Section 67(1).

the state agency is given great discretion and its advisory role to communities is compromised.¹⁴¹ Land use options that do not require a lot of bureaucracy and paper work and that have little regulation will be preferred to wildlife management.

Therefore, on deeper evaluation of the WCMB with respect of devolution of wildlife management to communities, what emerges is that the WCMB is at best, a study in contradiction.¹⁴² On the one hand, it provides that devolution is one of its guiding principles and goes ahead and creates various institutions and committees to enhance community participation while on the other hand it only gives delegated authority in wildlife management to these institutions and committees. According to Western and Waithaka devolution should be based on clearly prescribed rights and responsibilities of communities vis-a-vis national government and its agencies.¹⁴³ The WCMB seems not to devolve significant wildlife management rights to communities but creates institutions and bureaucracies that extend and augment state control.¹⁴⁴ The Bill therefore paints a picture of encouraging community participation but in effect it greatly inhibits devolution of wildlife management to the local levels.

2.5.3 THE DRAFT COMMUNITY LAND BILL, 2011

There is a draft Community Land Bill that is being discussed to bring effect to the provisions of Article 63 of the CoK. This Bill if enacted will provide for the allocation, management and administration of community land. According to Mbote *et al.*, community tenure recognizes several layers of rights belonging to different entities namely the entire clan, political leadership, the family and individuals.¹⁴⁵ The enactment of the Community Land Bill will bring in place governance structures for management of community land and resources thereon which will form institutions for devolution of wildlife resources. However, it is important to distinguish that ownership of wildlife is different from ownership of the land on which it is found. Wildlife in Kenya is owned by the state.

¹⁴¹ Kabiri (n77) 176.

¹⁴² Ibid 174.

¹⁴³ Western and Waithaka (n111) 366.

¹⁴⁴ Gibson (n102) 143.

¹⁴⁵ Mbote et al., *Ours By Right: Law, Politics and Realities of Community Property in Kenya* (n65) 59.

Community land has previously been held under different tenure regimes, the most prominent being under the Land (Group Representatives) Act.¹⁴⁶ The governance structures under this Act are group representatives of between three and ten persons elected by the community under a constitution adopted by the community.¹⁴⁷ Further, under the constitution adopted by the community, the community is required to elect persons to be officers of the group. The group representatives are to apply for incorporation under the Act.¹⁴⁸ The Act provides for regular meetings, proper maintenance of accounts and amicable dispute resolution procedures. These structures have been largely successful, save for the fact that community land tenure was prior to the CoK not recognized. This lack of recognition and securing of community land rights led to sub-division of community land and conversion into private land holdings which led to practices that were incompatible with wildlife management including fencing and unplanned development.

The Community Land Bill proposes governance structures within community land that will help to secure community land. These will be through a Land Administration Committee elected by the community.¹⁴⁹ To ensure full participation, the Bill proposes that nobody holding a traditional leadership position within the community will be eligible for election to that committee and further, at least one third of the total membership to the committee be women. The Bill also takes into account representation of vulnerable community members including children, youth, the elderly and the disabled on the committee.¹⁵⁰ The powers of the Land Administration Committee include allocation of land rights, planning and development of community land and dispute resolution. The Bill further makes provisions for administration of community land that will secure the rights of all communities in land such as prohibition of fences and grazing on the commonage.

¹⁴⁶ Cap 287 Laws of Kenya.

¹⁴⁷ Section 5.

¹⁴⁸ Section 7.

¹⁴⁹ Section 5.

¹⁵⁰ Section 5(3).

All these provisions go a long way in supporting the argument for devolution of wildlife management to communities. The governance structures form institutional units within which devolved structures would naturally fall. Further, provisions on administration of community land are compatible and in fact do secure space and opportunities for wildlife management. Open grazing commons and prohibition on fencing are compatible with wildlife management.

2.6 CONCLUSION

It is widely recognized that where opportunities for public participation in wildlife management are increased and power and authority to manage wildlife are devolved to communities, communities are likely to be more willing to conserve wildlife as a land use option.¹⁵¹ Management of wildlife resources by communities is likely to be done in a more sustainable manner if the community has the authority to make decisions on the management of these resources.¹⁵² The provisions of the CoK on community land¹⁵³ and the draft Community Land Bill, 2011 provide for community land tenure which will recognize community rights over land and will empower communities to manage that land. It would only be fair then that communities are given legal empowerment to manage and make decisions over wildlife on their land.

What emerges from the legal frameworks reviewed in this chapter is the extent to which the state is averse to entrusting wildlife management to communities.¹⁵⁴ The law betrays the desire to cling to wildlife as a resource, while only allowing communities to participate on its own terms.¹⁵⁵ Wildlife management, according to these legislative frameworks, remains the exclusive role of the national government.¹⁵⁶ Communities' role in wildlife management is limited and where it is allowed, it is highly supervised and regulated.¹⁵⁷

¹⁵¹ Cirelli (n44) 52.

¹⁵² Wasonga, Kambewa and Bekalo (n5) 171.

¹⁵³ Article 63

¹⁵⁴ Kabiri (n77) 176.

¹⁵⁵ Ibid.

¹⁵⁶ Nishizaki, (n79) 64.

¹⁵⁷ Kabiri (n77) 199.

CHAPTER 3

CONCEPTUALIZING DEVOLUTION OF WILDLIFE MANAGEMENT

3.1 INTRODUCTION

Devolution is said to be the strengthening of local communities to play a more representative, responsive and constructive role in their everyday lives.¹⁵⁸ Such strengthening usually involves some transfer of decision-making power from the central government to lower levels.¹⁵⁹ It is therefore often associated with the prospects of democratic self-governance, public participation, nation building, equalization and efficient and effective delivery of services.¹⁶⁰ The success of devolution depends on a proper architecture and design of the system.¹⁶¹ This can be achieved where local autonomy is created and defined by inclusive local processes empowered with decision making and resources that are meaningful to local people.¹⁶²

Devolution is not a new phenomenon in Kenya.¹⁶³ The independence Constitution had a devolved structure known as “majimboism”.¹⁶⁴ Kenya was divided into seven regions each with its own legislature and executive body. Each region was highly autonomous and was empowered to appoint its own police force and public service independent from the central government. The regions were also empowered to raise their own revenue through taxes and other means and were entitled to a fixed proportion of central government tax revenue.¹⁶⁵

¹⁵⁸ Jesse C. Ribot *African Decentralization: Local Actors Powers and Accountability* (United Nations Research Institute For Social Development, 2002) 2.

¹⁵⁹ Ibid.

¹⁶⁰ Dan Juma, 'Devolution of Power as Constitutionalism: The Constitutional Debate in Kenya and Beyond' (ssrn.com 2009) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1382821> accessed 3 August 2013

¹⁶¹ Office of the Deputy Prime Minister and Ministry of Local Government, *Final Report of The Taskforce on Devolved Government: A Report on the Implementation of Devolved Government in Kenya*, (Government of Kenya, Undated) 22.

¹⁶² Ribot (n158) 2.

¹⁶³ Stephen Ndegwa, 'Citizenship and Ethnicity: An Examination of Two Transition Moments in Kenya' (1997) 91 *American Political Science Review* 599, 601.

¹⁶⁴ Yvon Rocaboy et al., 'Public Finances of Local Government in Kenya' in Bernard Dafflon and Thierry Madis (eds.) *The Political Economy of Decentralization in Sub-Saharan Africa: A New Implementation Model in Burkina Faso, Ghana, Kenya, and Senegal*, (World Bank, 2012) 161, 161.

¹⁶⁵ Ndegwa (n163) 605.

However, there were several amendments done to the independence constitution which culminated in the 1969 constitution that favored a centralized form of Government.

Kenyans were not satisfied with the centralized system of government because they felt that services and resources were not reaching the grassroots. Further, many Kenyans viewed the centralized system of government as constraining their participation in democratic processes. Policies made at the centre did not fit in with all communities as each one had its unique needs and challenges. Therefore, in the 1990's there began agitation and clamour for reforms in the system of governance in Kenya which included the call for a devolved system of government. In 2010, through a referendum process, 66.9%¹⁶⁶ of Kenyan voters approved the CoK. The same was promulgated on 27th August 2010.

The CoK provides for a devolved system of government.¹⁶⁷ Its vision encompasses the transformation of Kenya through new accountable and transparent institutions and inclusive approaches to government through the newly established county governments.¹⁶⁸ There are therefore two levels of government namely national and county.¹⁶⁹ The CoK contemplates further decentralization below the county government.¹⁷⁰

Devolution is at the centre of the new governance concept. In protection of natural resources including wildlife management, this concept confronts the failures of traditional centralized management.¹⁷¹ It promotes participatory and devolved arrangements to better conserve natural resources as centralized management seems to have failed. This concept encourages non-government actors including communities to engage in participatory governance as an alternative

¹⁶⁶ 'Referendum Results 2010: Kenya Constitution Votes Results' (*Office Of Public Communications*, 5 August 2010) < <http://www.communication.go.ke/katiba/default.asp> > Accessed 1 December 2012.

¹⁶⁷ Article 6.

¹⁶⁸ Australian AID and the World Bank, *Devolution Without Disruption: Pathways To A Successful New Kenya* (Australian AID and The World Bank, 2012) v.

¹⁶⁹ Article 6

¹⁷⁰ Articles 176(2) and 184

¹⁷¹ Lobel (n59) 269.

to centralized wildlife management practices.¹⁷² Also at the centre of the new governance concept is public participation. According to Trubek and Trubek, new governance mechanisms are designed to improve participation among other things.¹⁷³

This chapter discusses devolution against the constitutional background, looking into the objectives of devolution in Kenya and the implementation of the constitutional provisions on devolution. This chapter also delves into the broader concept of decentralization in order to place devolution within its proper context. In doing these, the chapter reflects on the legislative frameworks on wildlife management in Kenya discussed in Chapter Two in order to clearly understand the place of their provisions within the concept of devolution. The Chapter also distinguishes between devolution and participation.

3.2 WILDLIFE MANAGEMENT

The legislative basis for wildlife management in Kenya is the Wildlife (Conservation and Management) Act.¹⁷⁴ This Act is based on the 1975 Wildlife Policy which advocates for proper wildlife management to maximize the returns from land.¹⁷⁵ There are various definitions of wildlife management but there are three aspects present in every definition of wildlife management. These are efforts directed towards sustainable wildlife populations, relationship between those populations and habitat and manipulations of wildlife populations and habitats to meet some specified human goals.¹⁷⁶ Wildlife management is a repeated process of analyzing current conditions and gauging them with desired conditions, making proper decisions, solving problems and creating opportunities to benefit from the resource.¹⁷⁷

Wildlife management is often confused with preservation and conservation. Conservation is an effort to maintain and use natural resources wisely in an attempt to ensure that those resources

¹⁷² Ibid.

¹⁷³ Trubek and Trubek (n60) 2.

¹⁷⁴ Cap 376 Laws of Kenya.

¹⁷⁵ Paragraph 3.

¹⁷⁶ Greg Yarrow, *Wildlife and Wildlife Management* (Clemson Extension, 2009) 1.

¹⁷⁷ Shawn J. Riley et al., 'Wildlife Management as a Process Within a System' in Daniel J. Decker et al. (eds) *Human Dimensions of Wildlife Management* (JHU Press, 2012) Chapter 7.

will be available for future generations. Preservation is a component or part of conservation in which natural systems are left alone without human disturbance or manipulation. Preservation advocates that natural resources be left protected, unspoiled and untouched by humans.¹⁷⁸ The goal of preservation is often maintaining the integrity of the ecosystem as exemplified by national parks.¹⁷⁹ The 1975 Wildlife Policy advocates for wildlife conservation but the practice in Kenya has been wildlife preservation especially after the ban on hunting in 1977.¹⁸⁰

The key issues at the forefront of wildlife management in Kenya which the government uses to advocate for a centralist system of wildlife management are wildlife security and human wildlife conflict (HWC). KWS is mandated under the WCMA to provide security to wildlife in Kenya both within and outside protected areas. KWS is established as a uniformed and disciplined service for this purpose.¹⁸¹ However, communities have put in place community rangers or scouts to secure wildlife. These are recognized by KWS and even trained at the KWS Law Enforcement Academy.¹⁸²

HWC management is also a mandate of KWS. Section 57A of the WCMA empowers KWS officers to use firearms for purposes of controlling problematic animals. However, under Sections 30 and 31 of the Act, landowners are allowed to kill wild animals in immediate defence of human life or property. The law only allows for compensation to people who have been injured by wildlife or whose relations have lost their lives as a result of HWC. Compensation comes from funds provided by government.

¹⁷⁸ Yarrow (n176) 2.

¹⁷⁹ Ibid.

¹⁸⁰ The Wildlife (Conservation and Management) (Prohibition on Hunting of Game Animals) Regulations (LN. No. 120/1977).

¹⁸¹ WCMA Section 3(1).

¹⁸² Kenya Wildlife Service, 'KWS Completes Training of Over 300 Community Rangers' (kws.go.ke 2012) <http://kws.org/info/events/2012/April_passout_parade2012.html> accessed 4th September 2013.

3.3 THE BROADER CONCEPT OF DECENTRALIZATION

The concept of decentralization is very broad and has many components.¹⁸³ The term decentralization carries several definitions but generally, it is characterized by distribution of decision-making governance closer to the people.¹⁸⁴ Central governmental authority and power is dispersed away from the national centre to other institutions at other levels of government or levels of administration.¹⁸⁵ Rondinelli et al. have defined decentralization as the transfer of responsibility for planning, management and resource raising and allocation from the central government and its agencies to field units of central government, subordinate units or levels of government or semiautonomous public authorities.¹⁸⁶

Since decentralization is a broad term, scholars posit that it contains sub-categories which reflect increasing or decreasing relinquishment of power by the central government.¹⁸⁷ The concepts of deconcentration, delegation, devolution and privatization have therefore come up.¹⁸⁸ Rondinelli et al., define deconcentration, delegation, devolution and privatization as sub-types of decentralization.¹⁸⁹ These will be discussed in greater detail below.

3.3.1 DECONCENTRATION

Deconcentration is the handing over of some amount of administrative authority or responsibility to lower levels within central government ministries and agencies.¹⁹⁰ It involves the shifting of the workload from centrally located officials to staff or offices outside of the national capital.¹⁹¹

¹⁸³ Rondinelli, Nellis and Cheema (n15) 13.

¹⁸⁴ Annette Omolo, 'Devolution in Kenya: A Critical Review of the Past and Present Frameworks' in Albert K. Mwenda (ed) *Devolution in Kenya: Prospects, Challenges and the Future* (Institute of economic affairs Research, 2010) 15, 15.

¹⁸⁵ Markus Böckenförde 'Decentralized Forms of Government' in Markus Böckenförde, Nora Hedling and Winluck Wahi (eds) *A Practical Guide to Constitution Building* (International Institute for Democracy and Electoral Assistance, 2011) 289, 289.

¹⁸⁶ Rondinelli, Nellis and Cheema (n15) 13.

¹⁸⁷ Hans F. W. Dubois and Giovanni Fattore, 'Definitions and Typologies in Public Administration Research: The Case of Decentralization' (2009) 32 *International Journal of Public Administration* 704, 705.

¹⁸⁸ Ibid.

¹⁸⁹ Rondinelli, Nellis and Cheema (n15) 13.

¹⁹⁰ Ibid.

¹⁹¹ Omolo (n184) 15.

It is more of an administrative decentralization. According to Riruako, deconcentration is the most common form of decentralization.¹⁹² In the Kenyan context a good example of deconcentration was The District Focus for Rural Development (DFRD) in the 1980's.¹⁹³ The CoK provision that a national state organ shall ensure provision of its services in all parts of the republic contemplates deconcentration of national functions from the capital.¹⁹⁴

Deconcentration gives some discretion to field agents to plan and implement programs and projects within guidelines set by the headquarters.¹⁹⁵ Field administrators are empowered with decision-making discretion.¹⁹⁶ This allows them the latitude to plan, make decisions, and to adjust the implementation of central directives to local conditions.¹⁹⁷ The claim by KWS that it has 'devolved' its functions by sending personnel to each County¹⁹⁸ is actually not devolution but deconcentration of its functions to the County level. This is because the officers sent to the Counties will not run autonomous units but will report to the central authority and implement policies set by the headquarters.

With deconcentration, the central government disperses responsibilities for certain functions to regional and branch offices that implement decisions made at the centre.¹⁹⁹ However, the authority or responsibility for specific functions remains within the central government structure.²⁰⁰ Further, the field officials remain employees of central government under whose control and direction they work.²⁰¹ The amount of discretion given to the field officials is too little and as a result the measures adopted can never be expected to result in meaningful

¹⁹² Hazo Riruako 'The Paradox of Decentralization in Namibia' (DPhil Thesis, University of the Western Cape 2007) 15.

¹⁹³ Omolo (n184)15.

¹⁹⁴ Article 6.

¹⁹⁵ Rondinelli, Nellis and Cheema (n15)13.

¹⁹⁶ Riruako (n192) 14.

¹⁹⁷ Ibid.

¹⁹⁸ Phillip Mwakio, 'Kenya Wildlife Service Devolves Operations to 47 Counties' The Standard (Nairobi, 18 May 2013) 4.

¹⁹⁹ Omolo (n184) 15.

²⁰⁰ Rondinelli, Nellis and Cheema (n15) 13.

²⁰¹ Riruako (n192)14.

decentralization.²⁰² This move enables the central authority to penetrate the arenas of lower levels of government and to exert their influences.²⁰³

3.3.2 DELEGATION

Delegation is the transfer of authority to organizations which are placed under the indirect control of central agencies.²⁰⁴ According to Rondinelli et al., delegation transfers managerial responsibility for specifically defined functions to organizations that are outside the regular bureaucratic structure and that are only indirectly controlled by the central government.²⁰⁵ This form of decentralization is viewed as being more extensive than deconcentration because the organizations are semi-autonomous.²⁰⁶ The organizations could be local government, state corporations, the private sector or Non Governmental Organizations (NGOs).²⁰⁷ In the wildlife sector, the Government created KWS as a state corporation²⁰⁸ to manage and protect wildlife on its behalf.

With delegation the organizations to which functions and duties are transferred have broad discretion to make decisions that will enable them efficiently carry out those functions.²⁰⁹ In this regard central government does not wholly control the activities of these institutions but the institutions remain accountable to central government.²¹⁰ Therefore, ultimate responsibility remains with the central government.²¹¹

Thus, under the WCMA, the central government has given authority to KWS to manage wildlife in Kenya on its behalf but ultimately, the government remains directly responsible for proper

²⁰² Ibid 15.

²⁰³ Ibid16.

²⁰⁴ Omolo (n184) 15.

²⁰⁵ Rondinelli, Nellis and Cheema (n15)19.

²⁰⁶ Riruako (n192)21.

²⁰⁷ Omolo (n184) 15.

²⁰⁸ Section 3.

²⁰⁹ Rondinelli, Nellis and Cheema (n15) 19.

²¹⁰ Riruako (n192) 21.

²¹¹ Rondinelli, Nellis and Cheema (n15) 19.

wildlife management and conservation. It does this through various ways of monitoring KWS's activities. One of the ways monitoring is done is by providing that the Director²¹² and the Chairperson of the Board of Trustees²¹³ be appointed by the President. This makes them directly accountable to the president for their actions. Another way of monitoring is through the statutory provisions that various central government ministries sit on KWS's Board of Trustees.²¹⁴

In some instances, delegation is looked upon as a way of removing important functions from inefficient government bureaucracies.²¹⁵ This happened in Kenya in 1989 when wildlife management was removed from the Wildlife Conservation and Management Department (WCMD) department, a department in a central government ministry, and placed in KWS a newly created state corporation because it was believed that WCMD had led to the mismanagement and decimation of elephant and rhinoceros species in Kenya.

Delegation has also been used as a means of maintaining public control over highly profitable or valuable resources.²¹⁶ In Kenya, wildlife resources are viewed as being very valuable and the CoK maintains the function of protection of wildlife as a central government function.²¹⁷ This could be the rationale for delegating the function to a state corporation so as to ensure ease of monitoring as opposed to devolving the function to the County governments.

3.3.3 DEVOLUTION

Devolution, according to Dubois, is a complex and wide subject with different connotations and meanings across time and space.²¹⁸ According to Rondinelli et al., it is the creation or strengthening of sub-national units of government, the activities of which are substantially

²¹² The Wildlife (Conservation and Management) Act, Section 3C.

²¹³ Ibid 3B(1)(a).

²¹⁴ Ibid Section 3B(1). The Central Government Departments responsible for Wildlife, Finance, Local Government and Internal Security sit on the KWS Board of Trustees.

²¹⁵ Rondinelli, Nellis and Cheema (n15) 19.

²¹⁶ Ibid 20.

²¹⁷ 4th Schedule, Part I Paragraph 22(b).

²¹⁸ Dubois and Fattore (n187) 705.

outside the direct control of the central government.²¹⁹ Devolution involves the transfer of power to these units which are autonomous from the central government.²²⁰ The authority to make public policy decisions is conferred on the sub-national entities by law.²²¹ This is a more extreme form of transfer of power and authority because unlike delegation where the transfer is temporary, devolution refers to a permanent transfer.²²² Devolution is thus broader than both deconcentration and delegation.²²³

Under devolution, central authorities exercise only indirect, supervisory control over devolved units.²²⁴ According to Odero, one of the banners under which devolved government was advocated for in Kenya was the bringing of governance closer to the people.²²⁵ The idea was to reduce the levels of administration through which activities have to pass, and to enhance citizenry productivity and participation by increasing their involvement in development activities.²²⁶ The fact that the CoK retains protection of wildlife as a function of the national government means that it is not willing to transfer this function to the counties, which are thought to be nearer to the communities.

Under the WCMB²²⁷, County Wildlife Conservation Committees are established as the means through which the Bill intends to ‘devolve’ wildlife conservation and management to the lowest level. These committees are to be set up by KWS²²⁸ and the chairperson is to be appointed by KWS.²²⁹ Further, out of a membership of nine persons, four are representatives of national

²¹⁹ Rondinelli, Nellis and Cheema (n15) 24.

²²⁰ Dubois and Fattore (n187) 705.

²²¹ Omolo (n184) 15.

²²² Riruako (n192) 18.

²²³ Omolo (n184) 15.

²²⁴ Rondinelli, Nellis and Cheema (n15) 24.

²²⁵ Odero (n70) 228.

²²⁶ Rondinelli, Nellis and Cheema (n15) 25.

²²⁷ Kenya Gazette Supplement No. 107 (National Assembly Bills No. 21).

²²⁸ Wildlife Conservation and Management Bill, Section 8(c).

²²⁹ Ibid, Section 24(a).

government functions within the County.²³⁰ These committees therefore do not represent devolution of wildlife management. Their being set up by KWS and the appointment of the chairperson by KWS demonstrates that they will exercise delegated functions from KWS.

3.4 OBJECTIVES OF DEVOLUTION

According to Ndulo, for devolution to be successful, the means adopted to devolve must achieve clearly set out objectives.²³¹ For Olowu and Wunsch, the key objective of devolution should be effective good governance and participation at the local level.²³² The CoK provides for one of the objectives of devolution as being the giving of powers of self-governance to the people and enhancing the participation of the people in making decisions affecting them.²³³ To provide for effective devolution, legislation on wildlife should provide for community participation and self governance of the people in management of wildlife resources. The objective of engendering community participation will deepen democracy at the local level.²³⁴

Another objective of devolution should be the encouragement of popular involvement in economic development.²³⁵ When decisions on resource use are made at the local level with participation of the people at the grassroots, resources will be more likely to be economically utilized. Article 174(d) of the CoK provides for one of the objectives of devolution as being the recognition of the rights of communities to manage their own affairs and to further their own development. If the powers to make decisions on management of wildlife and distribution of benefits accrued from wildlife management are made by communities, then they will be able to manage them in such a way that benefits to them increase and they will be able to develop their localities.

²³⁰ Ibid, Section 24.

²³¹ Muna Ndulo, 'Decentralization: Challenges of Inclusion & Equity in Governance' in Muna Ndulo (ed), *Democratic Reform in Africa: Its Impact on Governance & Poverty Alleviation* (James Currey, Oxford, Ohio University Press 2006) 89.

²³² Dele Olowu and James Wunsch (eds.), *Local Governance in Africa: The Challenges of Democratic Decentralization*, (Lynne Rienner Publishers, 2004) 2.

²³³ Article 174(c).

²³⁴ Ndulo (n231) 89.

²³⁵ Ibid 81.

Devolution should also strive towards motivating community leaders to take an active role, creating better communications between local residents and leaders and between local and national officials, and increasing community solidarity and interest in resource management projects.²³⁶ It should also be aimed at the improvement of productive efficiency and enhancement of optimal utilization of resources as each region strives to generate revenue and build its economy.²³⁷ The CoK has captured these objectives by providing for the promotion of social and economic development, the provision of proximate, easily accessible services throughout Kenya²³⁸ and ensuring equitable sharing of national and local resources throughout Kenya²³⁹ as being objectives of devolution. It will be difficult for communities to benefit from wildlife resource management and thereby develop their localities if the power to manage them and make decisions concerning them are not strategically placed within the communities.

3.5 IMPLEMENTATION OF DEVOLUTION IN KENYA

The CoK envisages the enactment of legislation by Parliament to give effect to its provisions on devolution.²⁴⁰ It gives the basic framework upon which devolution is to be implemented in Kenya and several statutes are enacted to govern various aspects of devolution. The CoK in paragraph 4 of the 6th Schedule establishes a select committee of Parliament to be known as the Constitutional Implementation Oversight Committee (CIOC) which is responsible for overseeing its implementation. Further, paragraph 5 of the 6th Schedule establishes the Commission for the Implementation of the Constitution (CIC) whose functions include the monitoring, facilitating and oversight of the development of legislation and administrative procedures required to implement the CoK. The CIC is supposed to work under the supervision of the CIOC.

Among legislation on implementation of Devolution in Kenya, is the Urban Areas and Cities Act²⁴¹ which was the first to be enacted. This Act provides for the management of urban areas

²³⁶ Rondinelli, Nellis and Cheema (n15) 11.

²³⁷ Ndulo (n231) 81.

²³⁸ Article 174(f).

²³⁹ Article 174(g).

²⁴⁰ Article 200.

²⁴¹ Act No. 13 of 2011.

and cities and provides in its 1st Schedule, a classification of towns and cities by services provided. Wildlife management is not among the services listed. This is in contrast to the Local Government Act (repealed)²⁴² which was the predecessor to this Act²⁴³ and gave local authorities powers to take measures for the preservation and protection of wildlife and provide amenities for the observation of wildlife within their respective areas.²⁴⁴

The Transition to Devolved Government Act²⁴⁵ was enacted in 2012 with the key objective of implementing the provisions of paragraph 15 of the 6th schedule to the CoK. This paragraph provides for the phased transfer of functions assigned by the CoK from the national government to county governments over a period of not more than three years from the date of the first election of county assemblies. The Act establishes a Transition Authority²⁴⁶ to facilitate and coordinate the transition to a devolved system of government.²⁴⁷ Under this Act, subsidiary legislation on Transferred Functions has been enacted²⁴⁸ and wildlife management is not among the functions transferred. A related function which is transferred is the implementation of national government policies on natural resources, but this is limited to policies on protection of water springs, wells and dams.²⁴⁹

The Intergovernmental Relations Act²⁵⁰ was also enacted in 2012 to establish a framework for consultation between the national and county governments and amongst county governments. The Act establishes a National and County Government Coordinating Summit which shall be the apex body for intergovernmental relations.²⁵¹ The Act also establishes the Intergovernmental

²⁴² Cap 265 Laws of Kenya.

²⁴³ Repealed by section 134 of the County Governments Act, No. 17 of 2012.

²⁴⁴ Section 145(w).

²⁴⁵ No. 1 of 2012.

²⁴⁶ Section 4.

²⁴⁷ Section 7(1).

²⁴⁸ Legal Notice No. 16 of 2013.

²⁴⁹ Paragraph 10.

²⁵⁰ No. 2 of 2012.

²⁵¹ Section 7.

Relations Technical Committee (IRTC)²⁵² which is responsible for the day to day running of the summit. Section 26 of the Act provides for the transfer of powers and functions between the two levels of government by written agreement. The agreement should provide for, among other things, the specific legal provisions supporting the transfer or delegation.²⁵³ This implies that where, for example, the national government wishes to transfer wildlife management functions to the County governments, the national legislation on wildlife management should provide a legal backing for such transfer. The WCMA does not provide for this and neither does the proposed legislation on wildlife, the WCMB.

The County Governments Act²⁵⁴ was also enacted in 2012 to provide for county governments' powers, functions and responsibilities. It details the functions and responsibilities of county assemblies and county executive committees. The Act contemplates further decentralization of the functions of county governments to urban areas and cities, sub-counties, wards, villages and such further units as the county government may determine.²⁵⁵ It also provides for citizen participation in county governments,²⁵⁶ public communication and access to information.²⁵⁷ This Act does not have provisions as to sharing of powers and functions between the two levels of government but is important because if wildlife management was devolved to County level, the Counties would be able to further devolve it to communities.

There is also the National Government Coordination Act²⁵⁸ which has some impact on devolution. The Act establishes an administrative and institutional framework for coordination of national government functions at the national and county levels of government. It provides for accessibility of national government services in all areas of Kenya.²⁵⁹ Section 15 of the Act provides for appointment of national government administrative officers to coordinate national

²⁵² Section 11.

²⁵³ Section 26(2)(b).

²⁵⁴ No. 17 of 2012

²⁵⁵ Section 48.

²⁵⁶ Section 87.

²⁵⁷ Part IX.

²⁵⁸ No. 1 of 2013.

²⁵⁹ Section 5.

government functions at the county level. This provision has led to a lot of controversy and dispute between county governors and the national government with county governors claiming that county commissioners are intent on usurping their powers. However, what is contemplated by the appointment of these administrators is the coordination of deconcentrated functions at the county level as the CoK does not devolve all functions to the county level.

3.6 DEVOLUTION OF WILDLIFE RESOURCES

The rise of devolution as an approach to managing wildlife resources seeks to engage local actors in decision making.²⁶⁰ Top down approaches to local wildlife management are viewed as exclusionary and ineffective for sustainable wildlife resource management.²⁶¹ The ideal devolution of wildlife management envisages that the communities hosting wildlife on their land receive full rights to use and manage the wildlife thereon.²⁶² Devolution of important wildlife management functions has various consequences depending on the function involved.²⁶³ According to Poole and Leakey wildlife management has many aspects some of which directly affect and involve the local community and others which do not.²⁶⁴

Devolution as discussed above is a highly disciplined process contingent upon the assumption of responsibility by communities and proper decision making structures.²⁶⁵ The assumption is that communities are capable of managing resources in sustainable ways and in pursuit of sustainable development.²⁶⁶ Local governance structures are thus created on the ground to ensure full participation by all community members. Capacity building is undertaken for communities and their leaders to enable them manage the wildlife effectively. Capacity building includes financial management, dispute resolution, security operations and data collection and analyzing. Benefit

²⁶⁰ Jeremy Lind and Jan Cappon, *Realities or Rhetoric? Revisiting the Decentralization of Natural Resources Management in Uganda and Zambia* (Acts Press, 2001) 5.

²⁶¹ Ibid.

²⁶² Patricia Kameri-Mbote, 'Innovative Approaches in Using Property Rights for Wildlife Management in Kenya' (2010) 13 *Waseda Proceedings of Comparative Law* 158, 184.

²⁶³ Joyce H. Poole and Richard E. Leakey, 'Kenya' in Ernst Lutz and Julian Caldecott (eds) *Decentralization and Biodiversity Conservation* (The World Bank, 1996) 55, 58.

²⁶⁴ Ibid.

²⁶⁵ Mbote, 'Innovative Approaches in Using Property Rights for Wildlife Management in Kenya' (n262) 184.

²⁶⁶ Lind and Cappon (n260) 5.

sharing should be left to each individual community as benefits differ widely between habitats and communities.²⁶⁷

With devolution of wildlife management, communities are given important powers such as the power to monitor and control abuses of wildlife, powers of zoning their land appropriately and powers to make decisions that will enable them to utilize the wildlife sustainably while at the same time gaining maximum benefits from it.²⁶⁸ Organizational models should embrace local interests and priorities and harness these for greater benefits to the communities.²⁶⁹ In the case of HWC, the control of wild animals may be achieved locally when the species is neither dangerous nor endangered.²⁷⁰ If dangerous or endangered species are involved, specially trained personnel with special equipment are needed and this calls for a more centralized system. In Kenya, there have been attempts to decentralize such functions by use of KWS trained honorary wardens and community scouts.²⁷¹

In terms of wildlife security, the need for on the ground protection varies depending on the threat.²⁷² The governance of security is becoming increasingly complex with more modern weapons used to commit crimes and evade detection and arrest.²⁷³ On the one hand, the national government continues to have a major role in security governance especially with the constitutional provisions that wildlife protection is a function of the national government and that security in the country is vested in the national security organs.²⁷⁴ On the other hand, a growing pluralisation of security governance is evident and has been explained primarily in the terms of

²⁶⁷ B.M Campbell, S. Shackleton and E. Wollenberg 'Overview: Institutional Arrangements for Managing Woodlands' in George Kowero et al. (eds) *Policies and Governance Structures in Woodlands in Southern Africa* (CIFOR, 2003) 9, 14.

²⁶⁸ Mbote, 'Innovative Approaches in Using Property Rights for Wildlife Management in Kenya' (n262) 184.

²⁶⁹ Campbell, Shackleton and Wollenberg (n267) 14.

²⁷⁰ Poole and Leakey (n263) 58.

²⁷¹ Ibid.

²⁷² Ibid.

²⁷³ Les Johnson and Clifford Shearing, *Governing Security Explorations in Policing and Justice* (Routledge, 2003) 145.

²⁷⁴ 4th Schedule to the CoK and Chapter 14 of the CoK.

states devolution or dispersal of certain policing functions to the non state sector as is envisaged by Article 247 of the CoK.²⁷⁵

When poaching is small scale and for the pot, community scouts may work more effectively to control the situation than a team of highly armed rangers from KWS or other national government security organs.²⁷⁶ If, however, the threat is a well organized poaching of an endangered species for trophy trade, then a specialized team from KWS would be the most effective.²⁷⁷

Another aspect of wildlife security is that the community members are the ones involved in wildlife poaching because they do not feel the benefits or ownership of wildlife. For example, according to KWS, in 2011, 81 per cent of rhino poaching and 82 per cent of elephant poaching took place outside PAs.²⁷⁸ However, it is argued that with devolution of wildlife management to communities, they will be more interested in the wildlife alive as it will be of direct benefit. Incidents of wildlife insecurity especially domestic poaching for the pot will reduce. Further, because poachers live among the community, they will find it difficult to carry out the poaching operations if communities are vigilant and interested in the security of their wildlife.

Within the structure of devolution, the government through a state corporation or ministry remains the guardian of the public interest and ultimate authority for wildlife.²⁷⁹ The government retains an oversight role which includes regulation of proper use, scientific authority, security interventions and arbiter in case of unresolved disputes. The government also puts in place deconcentrated structures for checks and balances to ensure that decision making and benefits are not controlled by elites within the community.²⁸⁰ Deconcentrated structures

²⁷⁵ Johnson and Shearing (n273) 145.

²⁷⁶ Poole and Leakey (n263) 58.

²⁷⁷ Ibid.

²⁷⁸ Kenya Wildlife Service, *KWS Annual Report and Financial Statements 2011* (n49) 1.

²⁷⁹ Mbote, 'Innovative Approaches in Using Property Rights for Wildlife Management in Kenya' (n262) 185.

²⁸⁰ B Campbell, Shackleton and Wollenberg (n267) 14.

within government can take the form of regional bodies or ecosystem based decentralization of the national entity that will be responsible for the oversight of wildlife management.²⁸¹

3.7 PUBLIC PARTICIPATION

Public participation is a key aspect of natural resources management because it allows communities to express their views on key governmental policies and laws concerning wildlife outside PAs.²⁸² Public participation is defined as the process by which public concerns, needs and values are incorporated into governmental and corporate decision making with the overall goal of better decisions that are supported by the public.²⁸³ Dietz and Stern give a broader definition by stating that “public participation includes organized processes adopted by elected officials, government agencies or other public or private sector organizations to engage the public in environmental assessment, planning, decision making, management, monitoring and evaluation.”²⁸⁴

One of the National values and principles of governance entrenched in the CoK is participation of the people.²⁸⁵ The CoK becomes more specific when it comes to natural resources management and provides that the state shall encourage public participation in the management, protection and conservation of the environment.²⁸⁶ It goes a step further and imposes a duty on individuals to cooperate with the government and other persons in the protection and conservation of the environment.²⁸⁷

In Kenya today, KWS realizes that for successful management of wildlife, the cooperation of communities living with wildlife is vital.²⁸⁸ The Community Wildlife Department of KWS is

²⁸¹ Jeanette Conacher and Arthur Conacher, ‘Policy Responses to Land Degradation in Australia’ in A. J. Conacher (ed) *Land Degradation* (Springer, 2001) 382, 363.

²⁸² Cedeño (n98) 7.

²⁸³ Creighton (n100) 7.

²⁸⁴ Thomas Dietz and Paul C. Stern (eds), *Public Participation in Environmental Assessment and Decision Making* (National Academies Press, 2008) 1.

²⁸⁵ Article 10(2)(a).

²⁸⁶ Article 69(1)(d).

²⁸⁷ Article 69(2).

²⁸⁸ Mbote, *Property Rights and Biodiversity Management In Kenya* (n43)141.

structured around the principle of public participation. According to Bashir and Udoto, it is a function of this Department to establish linkages and gain support for wildlife management from stakeholders and communities living with wildlife. The Department does this through community outreach, corporate social responsibility programs and encouraging communities to come up with enterprises that would enable them benefit from wildlife.²⁸⁹

There are four categories of the public which must be considered when deciding whether or not the 'public' has been involved. These are: stakeholders who are organized groups that are or will be affected by or that have a strong interest in the outcome of the decision; the directly affected public who are those that will experience positive or negative effects from the environmental decision; the observing public which includes the media and opinion leaders who may comment on the issue or influence public opinion; and the general public who are all individuals who are not directly affected by the environmental issue but may choose to be part of the decision making process.²⁹⁰

In *Hassan and 4 Others v KWS*²⁹¹ the court described the public as “those entitled to the fruits of the earth on which the animals live” when stating that there was no express consent from the community allowing KWS to translocate the rare hirola antelope from their land. In *Mada Holdings Ltd t/a Fig Tree Camp v County Council of Nariok*²⁹², the court gave a much wider description of public by stating that it is “the individual who has sufficient interest in the issue over which the public body is exercising discretion, or where the exercise of that discretion is likely to adversely affect the interests of the individual or even where it is shown that the individual has a legitimate expectation to be consulted before the discretionary power is exercised.”

²⁸⁹ Munira Anyonge-Bashir and Paul Udoto, 'Beyond Philanthropy: Community Nature-Based Enterprises as a Basis for Wildlife Conservation' [2012, 1] The GWS Journal of Parks, Protected Areas and Cultural Sites 67, 69

²⁹⁰ Dietz and Stern (n284) 15.

²⁹¹ (1996) 1KLR (E&L) 214 at 215.

²⁹² HC Judicial Review No. 122 of 2011, [2012] eKLR.

Public participation also requires the right of access to appropriate, comprehensible and timely information held by public institutions.²⁹³ In *Galana and 3 Others v AG and 2 Others*²⁹⁴, community representatives from Tana River District filed a suit against the defendants seeking, *inter alia*, a declaration that the legal notice declaring Tana Primate Reserve to be a national reserve be quashed as it was not a valid notice. The court held that the legal notice was indeed not valid as the community had not been made aware of the decision to gazette the area as a national reserve and their views had not been sought before the decision was made. Similarly, in *Republic v Minister of Forestry and Wildlife and 2 Others ex parte Charles Oduor Okello and 5 Others*²⁹⁵, the court quashed the gazette of Lake Kanyaboli National Reserve on the grounds that the Minister in gazetting the same did not consult all the interested parties and should have obtained the consent of the county council before proceeding to gazette the area.

Public participation is essential to sustainable development and good governance and as stated earlier in this chapter, is a critical aspect of the new governance concept.²⁹⁶ The rationale of public participation is to incorporate public values into decisions, improve the substantive quality of decisions, resolve conflict among competing interests and build trust in institutions and educate and inform the public.²⁹⁷ This is because technocrats in these institutions have not been directly elected by the people.

From the above the key distinction between devolution of wildlife resource management and public participation is that firstly, in devolution the communities themselves make decisions while in public participation they are merely consulted before the government agency makes a decision regarding the management of wildlife resources on their land. Secondly, public participation is just but one aspect of devolution in that when wildlife management is devolved to communities, they are still bound under the new governance concept to take into account principles of public participation when they are making decisions. A third distinction is that

²⁹³ UNEP (n68) 193.

²⁹⁴ HCCC No. 341 of 1993, [2007] eKLR

²⁹⁵ HC Miscellaneous Application No. 55 of 2010, [2012] eKLR

²⁹⁶ UNEP (n68) 193.

²⁹⁷ Creighton (n100) 20.

public participation by a government agency will take into account participation of different levels of the public and not just the community seeking to benefit from the decision that will be made. It can thus be concluded that devolution is a much higher form of participation by communities in wildlife management than public participation.

3.8 CONCLUSION

Despite Kenya having progressive constitutional and legislative provisions on devolution, the state continues to assert its authority and in some cases, like in the Local Government Act (repealed) has sought recentralisation of wildlife resource management in the central government. Under the CoK protection and management of wildlife are not devolved functions but remain centred in the national government. This is contrary to the new governance concept which advocates for devolution of wildlife resource management along with devolution of other aspects of governance.

Most ‘devolved’ wildlife management provisions, especially in the WCMB reflects rhetoric more than substance because the function is not constitutionally devolved and having such provisions in legislation would be unconstitutional. Devolution would enhance outcomes for local communities by enabling them to mobilise resources and negotiate better benefits. The constitutional centralization of wildlife is a serious threat to community incentives and the long-term sustainability of wildlife in community areas. Further, many reforms in the name of devolution do not appear to be structured in ways likely to deliver the presumed benefits and may ultimately undermine efforts to enhance community participation in wildlife resource management.²⁹⁸

²⁹⁸ Ribot (n158) 3.

CHAPTER 4

DO CURRENT PRACTICES IN WILDLIFE MANAGEMENT IN KENYA INDICATE SILENT DEVOLUTION? A CASE STUDY OF ISHAQBINI HIROLA COMMUNITY CONSERVANCY

4.1 INTRODUCTION

Kenya conserves its biodiversity through protected area systems in the form of National Parks, Reserves and Sanctuaries which cover approximately 8% of the Kenyan landmass.²⁹⁹ However, this space is insufficient for conservation of wildlife.³⁰⁰ Ecological, social and financial pressures on these protected areas have pushed the government to begin promoting community based wildlife management.³⁰¹ In Kenya, community wildlife conservation was adopted and initiated substantially with the establishment of the Kenya Wildlife Service (KWS) in 1990.³⁰² This move showed a commitment to the new governance concept which advocates for devolution and increased public participation.

The land outside Protected Areas is largely under the control of private land owners and communities.³⁰³ Some community lands which were Trust Lands under the previous Constitution were gazetted as National Reserves under Section 18 of the WCMA. Local Authorities managed the land and tourism aspects in such National Reserves, while KWS undertook the bulk of wildlife management activities. In some National Reserves such as Tana Primate Reserve, Kakamega Forest Reserve and Mwea National Reserve, KWS undertook the entire management of the Reserve including revenue collection and marketing for tourists.

²⁹⁹ Kenya Wildlife Service, 'Policy on Establishment of Conservancies, Training and Management of County Reserve, Private and Community Rangers' (www.kws.org 2010)
<www.kws.org/parks/community_wildlife_program/Conservancy.html> accessed 12 August 2013.

³⁰⁰ Ibid.

³⁰¹ Fred Nelson, 'Patronage or Participation? Understanding the Failure and Success of Community-Based Natural Resource Management Reforms in Sub-Saharan Africa' (2006) University of Michigan School of Natural Resources and Environment Research Paper, 22.

³⁰² Toshio Meguro, 'Change In Local Subsistence With Local Benefit: From The Case Of The Kimana Sanctuary in Southern Kenya' in Toshio Meguro (ed) *Re-conceptualization of Wildlife Conservation: Towards Resonance Between Subsistence and Wildlife* (Acts Press, 2009) 33, 33.

³⁰³ Kenya Wildlife Service, 'Policy on Establishment of Conservancies, Training and Management of County Reserve, Private and Community Rangers' (n299).

The importance of private land and community land in wildlife management cannot be gainsaid. This land provides dispersal areas for food, water, security and breeding grounds for many wildlife species and it has been found that about three quarters of the wildlife in Kenya exists on this land.³⁰⁴ Attempts have therefore been made to encourage community approaches to wildlife conservation.³⁰⁵ This is in keeping with Principle 10 of the 1992 Rio Declaration which provides that environmental issues are best handled with the participation of all concerned citizens at the relevant level.

The conservancy movement in Africa and indeed in Kenya has grown and expanded at a speed that could not be anticipated.³⁰⁶ At its heart is the notion that communities can play a major role in managing wildlife over large areas and in improving the welfare of local communities.³⁰⁷ People living in rural areas depend on the land and natural resources for their livelihoods.³⁰⁸ According to Mbote *et al.*, the last critical resource within the community is wildlife.³⁰⁹ Wildlife is therefore at the heart of the rural economy but the question that remains is how communities can tap this resource effectively for their benefit in the absence of legislation that provides for devolution of wildlife management to the community level.

The question is whether this conservancy movement is an indication of silent devolution of wildlife management. Silent devolution involves devolution as a passive or unintended reform.³¹⁰ It often occurs as initiative shifts where, without formal changes in legislative and institutional structures or policies, actors at the local level take initiatives in wildlife management where there are management gaps in government, thus effectively concentrating decision-making, benefit sharing and other elements of wildlife management at the local level.³¹¹ Silent

³⁰⁴ Meguro (n302) 33.

³⁰⁵ Ibid.

³⁰⁶ NACSO, *Namibia's Communal Conservancies: A Review of Progress and Challenges in 2009* (NACSO, 2010) 79.

³⁰⁷ Charlie Pye-Smith, *The Story of The Northern Rangelands Trust: Conserving Wildlife, Transforming Lives, Bringing Peace* (Ascent Limited, 2013) 10.

³⁰⁸ NACSO (n306) 20.

³⁰⁹ Mbote et al., *Ours By Right: Law, Politics and Realities of Community Property in Kenya* (n65) 58.

³¹⁰ Dubois and Fattore (n187) 717.

³¹¹ Ibid 704.

devolution can also be triggered by forces external from the local community which lead to a radical or gradual change in policy or area emphasis without change in legislative and governance structures. Silent devolution can therefore occur without the presence of explicit active legislative or decentralization policies.

KWS recognizes that community cooperation is essential for the success of wildlife conservation activities.³¹² However, for communities to participate in wildlife management on their land there has to be emphasis on incentives and benefits from wildlife.³¹³ According to NACSO, Conservation success outside protected areas depends on the benefits that local people gain from the wildlife resources being conserved.³¹⁴ Meguro argues that it is vital to demonstrate to communities that they will benefit from the wildlife management efforts otherwise they will not be interested in wildlife management.³¹⁵ When strong linkages are created between conservation goals and the economic value of wildlife, conservation is seen to deliver significant economic returns while safeguarding the wildlife resource.³¹⁶

This chapter focuses on community wildlife conservancies and describes their progress in managing wildlife resources, despite the law being silent on their existence. It also seeks to investigate whether or not community wildlife management is generating any benefits for local communities in the centralized wildlife management structure of Kenya. A case study of Ishaqbini Hirola Community Conservancy is done to gain a deeper understanding of community participation in wildlife conservation.

³¹² Kenya Wildlife Service, 'Policy on Establishment of Conservancies, Training and Management of County Reserve, Private and Community Rangers' (n299).

³¹³ Nelson, 'Patronage or Participation? Understanding the Failure and Success of Community-Based Natural Resource Management Reforms in Sub-Saharan Africa' (n301) 22.

³¹⁴ NACSO (n306) 20.

³¹⁵ Meguro (n302) 33.

³¹⁶ NACSO (n306) 20.

4.2 THE COMMUNITY CONSERVANCY MOVEMENT IN KENYA AND THE CREATION OF ISHAQBINI HIROLA COMMUNITY CONSERVANCY

Community conservancies are wildlife conservation areas on communal land.³¹⁷ This is often land held under the Land (Group Representatives) Act.³¹⁸ After 2010, communal land tenure gained constitutional recognition and was classified as community land.³¹⁹ There currently is a Draft Community Land Bill which it is hoped will strengthen community land tenure once enacted and thus strengthen community wildlife conservancies. For now, because no specific law provides for their existence, conservancies hold different legal status as they are registered under different legal regimes.³²⁰ They are registered as not for profit companies under the Companies Act³²¹ trusts under the Trustee Act³²², community based organizations (CBOs) under the Department of Gender and Social Development and associations under the Societies Act.³²³

The goal of community conservancies is often to improve the livelihoods of communities and encourage rural development through participation in ecotourism as well as to increase space for wildlife conservation by the provision of wildlife habitats on community land.³²⁴ Some of them engage in integrated livestock and wildlife management while others focus purely on conservation of wildlife.³²⁵ Conservancies also achieve practical local participation through community management of the protected areas and tourism business and thus expand sources of livelihoods for the community.³²⁶ In addition, they develop the community organizations'

³¹⁷ Meguro (n302) 33.

³¹⁸ Cap 287 Laws of Kenya

³¹⁹ Article 63.

³²⁰ Kenya Wildlife Service, 'Policy on Establishment of Conservancies, Training and Management of County Reserve, Private and Community Rangers' (n299).

³²¹ Cap 486 Laws of Kenya.

³²² Cap 167 Laws of Kenya.

³²³ Cap 108 Laws of Kenya.

³²⁴ Meguro (n302) 33.

³²⁵ Kenya Wildlife Service, 'Policy on Establishment of Conservancies, Training and Management of County Reserve, Private and Community Rangers' (n299).

³²⁶ Meguro (n302) 33.

capacity and self-sufficiency in biodiversity conservation, natural resource management and natural resource based enterprises.³²⁷

Ishaqbini Hirola Community Conservancy (IHCC) is a fairly new conservancy, having been created in 2007. It is located in Tana River County and covers a total area of 19,000 hectares.³²⁸ KWS classifies it as being within the Tana Primate Reserve ecosystem in the Coast Conservation Area.³²⁹ Its mission is to be a provider of community-led solutions in wildlife conservation, rangeland management and community development.³³⁰ It aims to empower its community members through sustainable wildlife conservation and resilient livelihoods.³³¹ The Conservancy is registered as a not-for-profit company under the Companies Act.

The conservancy forms a buffer to the Tana Primate Reserve and moderates the level of human interference inside the reserve.³³² The conservancy is also a habitat and home to about 200 endangered hirola antelopes and therefore an important wildlife conservation ecosystem for the country.³³³ The exact population of remaining hirola in the world varies considerably, but it is undisputedly Africa's most endangered antelope.³³⁴ This species and Ishaqbini Conservancy are the subject of the landmark 1996 case of *Hassan & 4 Others v KWS*³³⁵ where communities for the first time asserted their rights to *in situ* management of wildlife in Kenya.

The history behind that case is that in 1963, fears for the species' survival prompted the government to attempt a precautionary translocation of about 50 Hirola to Tsavo East

³²⁷ Mbote et al., *Ours By Right: Law, Politics and Realities of Community Property in Kenya* (n65) 55.

³²⁸ Kenya Wildlife Service, 'Ishaqbin Conservancy' (kws.org 2013) <http://www.kws.org/parks/community_wildlife_program/Conservancies/Ishaqbin.html> accessed 28 August 2013.

³²⁹ Ibid.

³³⁰ Ishaqbini Hirola Community Conservancy, 'Ishaqbini Hirola Community Conservancy' (ishaqbinihirola.co.ke 2013) <<http://www.ishaqbinihirola.co.ke/About+us>> accessed 28 August 2013.

³³¹ Ibid.

³³² Kenya Wildlife Service, 'Ishaqbin Conservancy' (n328).

³³³ Ibid.

³³⁴ Northern Rangelands Trust, 'Ishaqbini Hirola Community Conservancy' (nrt-kenya.org 2013) <<http://www.nrt-kenya.org/ishaqbini/>> accessed 28 August 2013

³³⁵ (1996) 1KLR (E&L).

National Park. Although well-intentioned, the translocation was strongly opposed by local communities.³³⁶ However, the communities did not further assert their rights and the antelopes were moved. In 1976, the government took a different approach and persuaded the Garissa County Council to have an area set aside for wildlife conservation which would include the conservation of the Hirola. The County Council thus proposed and approved the gazettelement of Arawale National Reserve covering an area of 450 square kilometers.³³⁷

In the early 1980's the Reserve witnessed increased poaching activities, overgrazing by domestic animals and human encroachment.³³⁸ Further, the escalating conflict in Somalia in the 1990s and continuous decrease in population numbers of the Hirola, led to a second translocation by KWS in 1996.³³⁹ This second translocation is what led the communities to seek redress from the court. In his judgment Justice Mbita stated that those entitled to the use of the land are also entitled to the fruits of the land including the flora and fauna thereon.³⁴⁰ He also held that KWS would be acting outside its powers if it were to move any animals or plants away from their natural habitat without the express consent of those entitled to the fruits of the earth on which the animals live.³⁴¹ He granted an injunction restricting the translocation of the hirola antelopes.

KWS therefore had to seek another means of conserving the endangered hirola without translocating them. With the failure of the Arawale National Reserve and the human encroachment therein, they began education campaigns and encouragement of local communities to conserve the antelope *in situ*. It is on this basis and the beliefs by the community that the

³³⁶ Peter Njoroge et al., 'A Survey of The Large and Medium Sized Mammals of the Arawale National Reserve, Kenya' [2009] *Journal of East African Natural History* 119, 120.

³³⁷ Ibid.

³³⁸ Francis Kamau Muthoni, 'The Population Size, Abundance and Distribution of the Critically Endangered Hirola Antelope (*Beatragus hunteri*) in Arawale National Reserve, North Eastern Kenya' (undated) Terra Nuova Transboundary Environmental Project Research Paper, 3
<http://proceedings.esri.com/library/userconf/proc07/papers/papers/pap_xx02.pdf> accessed 28 August 2013.

³³⁹ Ibid.

³⁴⁰ (1996) 1KLR (E&L) at page 2.

³⁴¹ Ibid.

presence of Hirolas are a sign of good fortune, that the local community set aside land and established the Ishaqbini Hirola Community Conservancy.³⁴²

4.2.1 GOVERNANCE STRUCTURES IN COMMUNITY CONSERVANCIES

Different community conservancies come up with different governance structures depending on cultural and other considerations. Most conservancies are structured under the group representatives envisaged in the Land (Group Representatives) Act as described in Chapter 2 of this thesis. These are therefore structures based on legislation and which require elected representatives and officials to manage communal land and by default, the resources thereon. Other conservancies establish governance structures depending on the legal regime under which they are registered for example, if they are registered as associations, community members become members of the association with the management body being an elected committee and the final decision making organ being the general meeting. Similarly, if it is registered as a company, it takes the governance structures of a company with community members being shareholders in the company and the key management body being a board of directors often elected by the shareholders.

Ishaqbini comprises of 3 Somali communities of the Abdullah clan drawn from Korisa, Kotile and Hara locations, who mainly derive their livelihoods as pastoralists by herding and livestock trading.³⁴³ The number of members in the conservancy is 6,000 people.³⁴⁴ The Northern Rangelands Trust (NRT)³⁴⁵ has been instrumental in the development of several crucial governance and administrative structures for the conservancy.³⁴⁶ Being a not-for-profit company, the main governing body is the general meeting which comprises the community as shareholders with the management being placed in a Board of Directors which is elected by the members at the annual general meeting.³⁴⁷

³⁴² Northern Rangelands Trust (n334).

³⁴³ Ishaqbini Hirola Community Conservancy (n330).

³⁴⁴ Smith (n307) 13.

³⁴⁵ A Biodiversity Conservation NGO based at Lewa Downs in Isiolo.

³⁴⁶ Northern Rangelands Trust (n334).

³⁴⁷ Smith (n307) 13.

For proper management at a technical level, there are various committees of the board which deal with different aspects of the management of the conservancy. These committees include the conservation committee, tourism committee, the finance committee and the grazing committee.³⁴⁸ The grazing committee in particular has been very instrumental in the success of reducing the livestock's competition with wildlife for pasture and water, which in turn has also helped to rehabilitate the rangeland.³⁴⁹ For the day to day management, there is a core management team which is currently being financed by NRT. This consists of a manager, an accountant, 15 scouts and 5 Kenya Police Reservists.³⁵⁰

The land upon which the conservancy was established is trust land under the old constitutional regime and it is anticipated that the same will be converted to community land once the Community Land Bill is enacted. Due to the fact that trust land under the old constitutional regime was to be managed by the local authority on behalf of the people, the conservancy affairs are overseen by the local authority. The subjectivity of the land holding to the local authority brings several challenges in the governance structures of IHCC, the key one being the sustainability of the conservancy. It has been the practice in Kenya that trust land held by local authorities has been increasingly converted to private land and sold off to individuals without taking into account the interests of communities.³⁵¹ Further, because wildlife management has not been devolved to communities by law, KWS oversees the security and management aspects of the conservancy and the conservancy manager has to report to the KWS warden in the area on the wildlife management activities within the conservancy.

³⁴⁸ Kenya Wildlife Service, 'Ishaqbin Conservancy' (n328).

³⁴⁹ Northern Rangelands Trust (n334).

³⁵⁰ Kenya Wildlife Service, 'Ishaqbin Conservancy' (n328).

³⁵¹ Patricia Kameri-Mbote, 'Land Tenure, Land Use and Sustainability in Kenya: Towards Innovative Use of Property Rights in Wildlife Management' in Nathalie J. Chalifour et al. (eds) *Land Use Law for Sustainable Development* (Cambridge University Press, 2007) 132, 148.

4.2.2 COMMUNITY BENEFITS FROM THE CONSERVANCY MOVEMENT

Natural resources are the main drivers of rural economic growth and development when their full potential is unlocked through modern, market-based conservation approaches.³⁵² Wildlife often forms a basis for rural economies, because people in rural areas depend on natural resource use for their survival, be it through wildlife management and tourism or use of wild flora.³⁵³

Community participation in wildlife management leads to a plethora of benefits both to the communities and to the wildlife species being managed, thereby translating into great socio-economic benefits to the country. With proper incentives given to communities living with wildlife, community participation in wildlife management can be greatly enhanced. One of the key incentives to communities is the devolution of wildlife management to them. This will give them the power to make decisions and put in place local structures that will benefit both themselves and the wildlife they are managing.

One of the benefits of community participation in wildlife management is that communities benefit economically from wildlife. Wildlife management has become increasingly preferred as a form of land use, thereby hedging out land use practices that are incompatible with wildlife conservation to other appropriate areas.³⁵⁴ However, the economic and social benefits of wildlife management need to substantially outweigh the costs associated with conservation such as living with potentially destructive wildlife and be competitive with other forms of land use, thereby making it economically attractive to set aside land for wildlife management.³⁵⁵ This will result in winning more space for wildlife conservation.

The most direct benefit to conservancy members is employment in positions that have been created for purposes of managing the conservancy.³⁵⁶ Jobs are created for the local youth as

³⁵² NACSO (n306) 42.

³⁵³ Ibid.

³⁵⁴ Kenya Wildlife Service, 'Policy on Establishment of Conservancies, Training and Management of County Reserve, Private and Community Rangers' (n299).

³⁵⁵ NACSO (n306)20.

³⁵⁶ Ibid 22.

conservancy managers, community rangers and workers in tourist facilities.³⁵⁷ IHCC employs 22 members from the community with 15 community rangers and 5 police reservists having undergone wildlife law enforcement training at KWS law enforcement academy. Further, casual community labour has been used in the construction the Hirola Sanctuary within the conservancy and the construction of offices and ranger houses.

Another benefit of community participation in wildlife management is diversification of sources of livelihoods. Revenue and other ancillary benefits, from tourism investments accrue directly to the local communities.³⁵⁸ In areas where community conservancies have been established, communities are investing the proceeds from conservation and tourism in education, health and other key social amenities, thus improving their quality of life.³⁵⁹

Construction of tourist accommodation also ensures that communities get some revenue from the wildlife management activities through accommodation fees and sourcing of supplies for the tourism facility from the local community.³⁶⁰ For IHCC, management plans and reports for the Tana Primate ecosystem have cited the need for tourism development which is lacking within the area.³⁶¹ A prospectus for the project has already been produced and several investors had assessed the area positively. The tourism facility to be constructed within the conservancy will open up the area both for the social and economic development of the community.³⁶² It will bring direct benefits to the community as it is expected that it will mostly employ the locals. Given the area's unique species and biodiversity coupled with its abundant wildlife, Ishaqbini has great potential for tourism development.³⁶³ In the meantime, the conservancy hosts self-catered camping along the banks of Lake Ishaqbini as well as in the bush.³⁶⁴

³⁵⁷ Smith (n307) 6.

³⁵⁸ Fred Nelson, 'Recognition and Support of ICCAs in Kenya' in Ashish Kothari et al. (eds) *Recognizing and Supporting Territories and Areas Conserved By Indigenous Peoples And Local Communities: Global Overview and National Case Studies* (ICCA Consortium, 2012) 1, 13.

³⁵⁹ Smith (n307) 6.

³⁶⁰ Mbote, *Property Rights and Biodiversity Management In Kenya* (n43) 142.

³⁶¹ Kenya Wildlife Service, 'Ishaqbini Conservancy' (n328).

³⁶² Ibid.

³⁶³ Northern Rangelands Trust (n334).

³⁶⁴ Ibid.

Another important benefit from the establishment of wildlife conservancies, particularly those in northern Kenya, has been improved security.³⁶⁵ One of the main challenges faced in northern Kenya is insecurity due to cattle rustling, presence of small arms, ethnic strife and contested access to pastures and water.³⁶⁶ Through the conservancy movement, communities have set up a range of mechanisms to resolve conflicts through community policing by way of community rangers, improving communication through use of security radio networks and improving road transport accessibility.³⁶⁷ These efforts are helping to bring peace and good governance to areas where the government has failed to make a change. Peace remains a pre-requisite for successful wildlife conservation.³⁶⁸ The rangers, together with the five police reservists of IHCC have greatly improved the general security in the area. There is now proper communication and development of infrastructure including the construction of an airstrip which has gone a long way to improve the accessibility to the area.³⁶⁹

In biological terms community conservancies are a critical component of Kenya's conservation landscape as the conservancies protect key portions of large migratory wildlife populations.³⁷⁰ They are also helping to restore wildlife populations due to improved security and proper ecosystem management.³⁷¹ Conservancy efforts to minimise poaching and ensure sustainable management have been rewarded by remarkable wildlife recovery in some parts of Kenya.³⁷² The conservancy movement has also helped to reduce cases of human wildlife conflict as the land use practices are now largely compatible with the existence of wildlife.³⁷³

³⁶⁵ Nelson, 'Recognition and Support of ICCAs in Kenya' (n358) 13.

³⁶⁶ Ibid.

³⁶⁷ Ibid 14.

³⁶⁸ Smith (n307) 6.

³⁶⁹ Kenya Wildlife Service, 'Ishaqbin Conservancy' (n328).

³⁷⁰ Nelson, 'Recognition and Support of ICCAs in Kenya' (n358) 14.

³⁷¹ Smith (n307) 5.

³⁷² NACSO (n306) 51.

³⁷³ Ibid 48.

For IHCC, the establishment of an *in situ* predator proof sanctuary for protection and conservation of Hirola has greatly impacted on the economy of the conservancy.³⁷⁴ In August 2012, 48 hirola were moved into the sanctuary.³⁷⁵ Further, the sanctuary itself is expected to be a great tourist attraction as it hosts the few last hirola antelopes which are critically endangered species. It is also anticipated that income from education tours and scientific research will accrue from the sanctuary as it is the only existing hirola sanctuary in the world.

4.2.3 CHALLENGES OF COMMUNITY PARTICIPATION IN WILDLIFE MANAGEMENT

The issues that affect conservation outside protected areas include human-wildlife conflict, wildlife insecurity, space for wildlife, limited technical and financial capacity to manage wildlife, limited wildlife education and awareness and slow implementation of land use policies.³⁷⁶ At the landscape scale, many areas face increasing pressures from a combination of human population growth, economic expansion, new or growing commercial interests and the effects of drought and climate change.³⁷⁷

Further, conservancies vary in size, human population and wildlife species. A major challenge in addressing problems facing community management of wildlife resources is linked to this great variation in the character of conservancies.³⁷⁸ This problem is further exacerbated by the fact that donations are currently the major source of funding for conservancies in Kenya.³⁷⁹ Some conservancies are particularly well supported by donors while others, especially those which lack any great tourist appeal, have to raise their own funds for their operations.³⁸⁰ IHCC for example has to rely on NRT to supplement their budget until they become economically self sufficient.

³⁷⁴ Ishaqbini Hirola Community Conservancy (n330).

³⁷⁵ Northern Rangelands Trust (n334).

³⁷⁶ Kenya Wildlife Service, 'Policy on Establishment of Conservancies, Training and Management of County Reserve, Private and Community Rangers' (n299).

³⁷⁷ Nelson, 'Recognition and Support of ICCAs in Kenya' (n358) 18.

³⁷⁸ NACSO (n306) 17.

³⁷⁹ Smith (n307) 46.

³⁸⁰ Ibid.

Conservancies are also heavily influenced by location and a range of socio-political and economic factors. These differences in conservancy character mean that they do not all have an equal ability to generate income.³⁸¹ IHCC had to prioritize the construction of an airstrip to ensure accessibility which would then lead to income from tourism. Further, the location of IHCC is in a place which is thought to be highly insecure. The location by road means travelling through Garissa town which has been marred by recent Al-shabaab terrorist attacks. The other alternative route is via the Kenyan coast passing through Tana River which has been marred by ethnic clashes in the recent past. Such negative stories coming from surrounding areas reduce the tourism potential of IHCC.

Insufficient recognition of the conservancy movement by legislation remains the greatest impediment to the long-term sustainability of conservancies.³⁸² However, the WCMB brings some hope as it provides for the establishment and registration of conservancies.

4.3 COMMUNITY EFFORTS TOWARDS SILENT DEVOLUTION

As seen from the study of IHCC above, communities have taken management of wildlife seriously and have put in place governance structures and security structures that will enable them tap into the benefits of having wildlife on their land. The fact that the law does not devolve wildlife management to community levels has not daunted them. In Kenya today, many communities are coming up with wildlife conservancies on their land. There is therefore a one stop shop for wildlife management, security and HWC resolution nearer to the people albeit in governance structures not recognized under the WCMA.

The conservancy movement in Kenya is now very strong and so widespread that communities have seen the need to standardize their operations for the greater benefit of wildlife management even in the absence of legislation establishing standards for community wildlife management. Communities have also found the need to strengthen themselves by having a single voice in their interactions with government, private sector investors and other stakeholders so as to enhance their benefits from wildlife management.

³⁸¹ NACSO (n306) 17.

³⁸² Ibid 81.

To this end, communities managed to form regional associations which helped them achieve their goals on a regional basis.³⁸³ However, they were unable to come together and form a national unit that would strongly advocate for their cause. NGOs saw the gap and attempted to fill it by being the voice of the communities. In 2009, they established an umbrella body known as the National Environment Civil Society Alliance of Kenya (NECSA-K). NECSA-K is an NGO and CBO alliance established with the goal of fostering social and economic development in an environmentally sustainable manner and articulating and advocating for issues on the environment.³⁸⁴ NECSA-K also aims at ensuring good governance within conservancies by training and capacity building of conservancy committees and managers to ensure proper decision making procedures.³⁸⁵

Communities were not satisfied with NECSA-K as they felt that it only articulated the agenda that the NGOs felt was important. The communities wanted their own voice to be heard and to have a strong front when interacting with government, donors, private investors and NGOs. On 23rd August 2012, persons representing 120 community and private conservancies came together for the first time and held a conference in Nairobi where they resolved to form an umbrella association that would represent their interests.³⁸⁶

They met again on December 4th 2012 and came up with a constitution of their association to be known as Kenya Wildlife Conservancies Association (KWCA). They also elected a fourteen member interim board which was mandated to register the association and initiate its

³⁸³ Nelson, 'Patronage or Participation? Understanding the Failure and Success of Community-Based Natural Resource Management Reforms in Sub-Saharan Africa' (n301) 22.

³⁸⁴ NECSA-K, *National Environment Civil Society Alliance of Kenya (NECSA-K) Strategic Plan 2012 – 2016: In Pursuit of a Sustainable and Sound Management of Natural Resources for Humanity* (WWF KCO/NECSA-K, 2011) 5.

³⁸⁵ Ibid.

³⁸⁶ King King, 'Wildlife Managers Form Conservancy Association' (news24.com 2012) <<http://m.news24.com/kenya/MyNews24/Wildlife-managers-forms-conservancy-association-20121011>> accessed 28 August 2013.

operations.³⁸⁷ KWCA is now duly registered as an association under the Societies Act and as a not for profit company under the Companies Act to carry out the business aspects of the association. It has started operations with offices in Nairobi through the support of The Nature Conservancy (TNC). It has duly recruited a chief executive officer and a lean secretariat and has begun doing countrywide campaigns to strengthen regional associations based on the wildlife ecosystem approach.

4.4 CONCLUSION

It is clear that the communities who manage wildlife do so not just for their own benefit but for the benefit of the country as a whole.³⁸⁸ This is because in so doing, they are protecting natural resources and creating a safe haven for wildlife, improving the way the land is managed, improving security and reducing conflict.³⁸⁹ It is apparent that the state recognizes this because in 2012, treasury allocated US\$180,000 to KWS to support community conservancies, albeit being only a drop in the ocean in terms of what is required to establish community conservancies. This was clear evidence of the government acknowledging that conservancies do play a very crucial role in the Kenyan economy.³⁹⁰

Some scholars hold that the conservancy movement is limited in its approach since it is predicated upon the theory that communities should participate in the management of wildlife but the wildlife resource remains under the ownership of the state. The holder of property rights over an asset should have the ability to gain from that asset by direct consumption or exchange.³⁹¹ Constraint of uncompensated management efforts and lack of a feeling of ownership of the wildlife will reduce community interest in managing the wildlife.³⁹² From the

³⁸⁷ Kenya Wildlife Service, 'A Newly Formed Wildlife Sector Stakeholders' Body To Galvanize Industry Governance' (kws.go.ke 2012) <http://www.kws.go.ke/info/news/2012/03_12_12_conservationists.html> accessed 28 August 2013.

³⁸⁸ NACSO (n306) 41.

³⁸⁹ Smith (n307) 46.

³⁹⁰ Ibid.

³⁹¹ Mbote et al., *Ours By Right: Law, Politics and Realities of Community Property in Kenya* (n65) 33.

³⁹² Ibid.

studies of IHCC, communities started out by mere public participation in the management of wildlife in their area and are now taking strides towards silent devolution.

Further, despite the law being silent of community wildlife management, it is clear from the case study of IHCC that communities in Kenya increasingly have an officially recognised role in managing wildlife. The role of KWS in the establishment of IHCC also demonstrates that though the government is unwilling to devolve wildlife management to communities through legislation, it is still keen on having communities participate in wildlife management so as to win more space for wildlife on community lands. The failure of the law to provide for devolution as is posited by the new governance concept has not deterred communities from going ahead to manage wildlife resources on their land in the hope of accruing benefits. As the new governance concept posits, where the law does not take into account local conditions, local conditions will come up with innovative ways to cover up such gaps and one such way is silent devolution.

CHAPTER 5

FINDINGS, CONCLUSIONS AND RECOMMENDATIONS

5.1 SUMMARY

This study began on the premise that devolution of wildlife management in Kenya would enhance community participation in wildlife conservation. The study went ahead to look into the Kenyan legal frameworks on wildlife conservation and management to determine whether or not wildlife management was devolved to communities by legislation in order for them to benefit. It was hypothesized that the legal frameworks in Kenya do not adequately provide for devolution of wildlife management and that communities are not encouraged to participate in wildlife management due to legislation that is pro-centralization of wildlife resource management.

The first research objective was to critically examine the legal frameworks on wildlife management in Kenya to establish whether or not they provide for devolution. The two research questions to be answered in order to meet this objective were what the legal frameworks on devolution of wildlife management in Kenya were and if they were effective in encouraging community participation. Three pieces of legislation were identified and examined. These were the Constitution of Kenya (CoK), the Wildlife (Conservation and Management) Act³⁹³ (WCMA) and the Wildlife Conservation and Management Bill, 2013³⁹⁴ (WCMB).

The second objective of this study was to evaluate the different levels of decentralization and assess the inclusion of devolution in the Kenyan wildlife management legislation. The study looked at various concepts of decentralization and evaluated the three pieces of legislation in light of these concepts. It then went further to assess the place of devolution within the current Kenyan constitutional regime and whether wildlife management fitted in this regime.

The third objective was to examine whether communities fully participate in wildlife management within the subsisting legal frameworks. The study made an assessment of the

³⁹³ Cap 376 Laws of Kenya

³⁹⁴ Kenya Gazette Supplement No. 107 (National Assembly Bills No. 21).

current practices in community wildlife management in Kenya and looked at a case study of Ishaqbini Hirola Community Conservancy in order to gain a deeper understanding.

5.2 FINDINGS

Two significant findings emerged from this study. First, it was found that the legislative frameworks, that is the CoK, the WCMA and the WCMB do not devolve wildlife management to local communities. It became apparent that the state was unwilling to devolve wildlife management to local communities through legislation. The CoK was found to provide for key aspects of the new governance concept including devolution, public participation and community benefits from natural resources. However, on a deeper assessment of the constitutional provisions, it was revealed that the national government had retained management of wildlife resources. No devolution of management of wildlife resources is provided for even to lower levels of government as protection of wildlife remains a national government function.

Under the WCMA, it was clear from the preamble of the Act that the main mischief which was being addressed by its enactment was the management rights over wildlife resources in different entities including local communities and private landowners. The Act therefore sought to consolidate wildlife management in one government entity known as KWS which was created thereunder. The provisions of the Act were found to bear towards centralization of wildlife management in the national government which delegated this function to a state corporation, namely KWS. It was also found that the WCMA was an old piece of legislation having been enacted in 1976 with the last major amendments done in 1989 and therefore did not reflect any aspect of the new governance concept, especially devolution.

The findings on the WCMB were that it was to be the future legislation on wildlife in Kenya but still did not reflect devolution as an aspect of the new governance concept. In keeping with the CoK, probably to avoid having conflicting provisions, the WCMB was found to provide that the principles that would guide its implementation were devolution and public participation, among others. However, upon further assessment of the Bill, it was found that its institutional structures tipped towards centralization of wildlife resources in the national government. The devolution structures put in place, especially the County Wildlife Conservation Committees, were found to

be intended to exercise delegated powers from KWS. It was therefore the finding of this study that the WCMB did not provide for devolution of wildlife resources to communities.

The second finding of this study was that the failure of the legislative frameworks to provide for devolution of wildlife resource management to communities was inconsistent with the communities' expectations. The findings disclosed that the government, through KWS encouraged community participation in wildlife management and further supported the community conservancy movement to the extent of providing funding through the treasury. Communities on their part were setting up conservancies amidst several challenges and despite the silence of the law with the hope of benefitting from wildlife management activities. The participation by communities was found to go beyond mere public participation and was indeed leading to silent devolution.

5.3 CONCLUSION

From the findings, it can be concluded that the government is not willing to devolve wildlife management to communities. The hypothesis that the legal frameworks in Kenya do not adequately provide for devolution of wildlife management was therefore proved correct. The puzzling issue was why the national government was not willing to legislate, especially in the CoK on the devolution of wildlife management to communities. The conclusion may be that the interests of the national government make it a major claimant on the benefits from wildlife and there are either fears or misconceptions that devolving those rights to communities will disenfranchise the state from benefitting from wildlife and give it a weaker control over wildlife resources.

On the other hand, from the prevailing circumstances on community participation in wildlife management and from the case study of IHCC, it is apparent that the state through KWS is actively encouraging communities to engage in wildlife management. This is happening even in the face of the WCMA which actively provides for centralization of wildlife management in the government. Therefore, one would be quick to conclude that the hypothesis that communities are not encouraged to participate in wildlife management due to legislation that is pro-

centralization has been disproved. However, one should read deeper into the circumstances before arriving at such a conclusion.

Despite actively encouraging community wildlife management since the 1990's, the state is still unwilling to devolve wildlife management through the WCMB. These actions of the state go against the sociological theory of law and in particular social utilitarianism which posits that the law is the outcome of community life and that it must serve the community.³⁹⁵ Pound argues that law should not be divorced from the actual life in society because law exists to serve social interests of the citizens.³⁹⁶ The countrywide establishment of community conservancies for purposes of wildlife management, coupled with the active encouragement of community wildlife management by KWS would lead one to anticipate that the next step would be that review of wildlife legislation would devolve wildlife management to communities.

The WCMA is already divorced from the actual practice by the communities and the WCMB proposes to remain equally divorced from the actual practice. According to Omony, law which is divorced from social realities is inadequate and incomplete and must adapt itself to suit conditions of a changing society.³⁹⁷ The WCMB, if enacted in its current form will prove to be inadequate as Kenya moves into the future of wildlife management as it has failed to adapt to the current realities in society.

Given the foregoing, the question remains as to the conditions under which one would expect the government to devolve wildlife management to communities. Kabiri argues that such conditions would only occur where there is actual community wildlife management prior to the devolution being enacted.³⁹⁸ It is his contention that communities must be in a position to present their preferred outcome effectively to the government and only at this time will the government accept

³⁹⁵ Mary Parker Follet, *The New State; Group Organization The Solution of Popular Government* (Pennsylvania State University Press 1998) 122.

³⁹⁶ Roscoe Pound, *Jurisprudence* (The Law Book Exchange Ltd Union, 2000).

³⁹⁷ Omony John Paul, *Key Issues In Jurisprudence; An In-Depth Discourse on Jurisprudence Problems* (Law Africa, Undated) 86.

³⁹⁸ Kabiri (n77) 265.

devolution of wildlife management to local communities as a viable strategy.³⁹⁹ However, with the outcome of this study, it is apparent that Kabiri's hypothesis must fail. This is because the local communities in Kenya are already managing wildlife and indeed there is silent devolution taking place which is actively being encouraged by the government although the government is still unwilling to legislate on devolution of wildlife management to communities.

Mere goodwill by government agencies and government officials cannot be relied upon. Such goodwill can be withdrawn at any moment with changes in leadership as silent devolution occurs in the absence of policies and legislation. As Nelson observes, community conservancies in Kenya developed since the 1990s to strengthen local conservation efforts and have received mixed support from government.⁴⁰⁰ Since those early days, support from KWS has been inconsistent.⁴⁰¹ Where the law does not specifically provide for devolution of wildlife management to local communities it cannot be said that active support or mere complacency by government will indeed secure community participation. It can therefore be concluded that the hypothesis that communities are not encouraged to participate in wildlife management due to legislation that is pro-centralization has neither been proved nor disproved. One would have to wait to see the impact of a shift in government attitude towards community wildlife management in the absence of devolution to effectively prove this hypothesis.

5.4 RECOMMENDATIONS

From this study, the evidence is that communities can become effective institutions for sustainable resource management, but only if the right to manage wildlife is devolved to them through legislation. This will give them the power and authority to make decisions on the management of the wildlife resources, the determination of the mode of usage, to benefit fully from wildlife and to determine the distribution of such benefits and rules of access. When legislative frameworks do not provide for devolution of wildlife management to communities, they exclude these components and thereby frustrate the goal of making communities effective institutions for wildlife management.

³⁹⁹ Ibid.

⁴⁰⁰ Nelson, 'Recognition and Support of ICCAs in Kenya' (n358) 24.

⁴⁰¹ Ibid.

It is therefore recommended that reforms that would lead devolution of wildlife management to communities should be included in the legislative frameworks. The national government should coordinate with the county government and carry out a countrywide survey of the appropriate mechanisms for community participation in wildlife management and the most appropriate benefit sharing mechanisms. Devolution will secure more equitable distribution of responsibilities among community members and ensure proper benefit sharing mechanisms.⁴⁰² According to Guthiga and Ogada, sustainability of community wildlife management is heavily dependent on tangible benefits derived by communities from their wildlife management efforts.⁴⁰³ The government should give incentives to communities or come up with some other benefit systems to go along with devolved wildlife management.

Secondly local governance structures and community capacity need to be strengthened, especially financial management structures so as to ensure that all members of a community actually benefit once the law devolves management of wildlife to local communities. Capacity of communities is important for success in effecting devolved wildlife management as the government will no longer have an overbearing presence. The government should therefore equip communities with appropriate skills and resources to enable them sustainably manage wildlife on their land. This can be done in partnership with the NGO's established for this purpose.

Thirdly, the WCMB should provide for institutional reforms that devolve wildlife management to local communities while at the same time maintaining the integrity of wildlife resources in Kenya. To achieve this, it is recommended that the law provides that national government be a policy maker and have oversight over all wildlife resources. County governments should then have regulatory institutions that will regulate the wildlife management practices within their respective jurisdictions. The law should also provide for an independent dispute resolution institution that all parties can approach to address their grievances on wildlife management issues.

⁴⁰² Lind and Cappon (n260) 7.

⁴⁰³ Guthiga and Ogada, (n74).

5.5 PROPOSED DEVOLUTION STRUCTURES

A workable plan for wildlife management that both ensures sustainability and takes into account needs of communities hosting wildlife on their land would dictate that the state divest itself to some extent of the rights to wildlife resources.⁴⁰⁴ Establishing local institutions to manage the environment is one way to recondition unfavourable actions and attitudes and to facilitate more sustainable ways of managing wildlife.⁴⁰⁵ It is proposed that the law establishes devolved structures at various levels to ensure proper management of wildlife.

At national level, KWS should be retained as an oversight and scientific body for wildlife management in Kenya. It should be mandated to oversee all aspects of wildlife management including wildlife security, HWC and scientific interventions. KWS should retain wildlife security aspects of sophisticated trophy poaching while community rangers handle issues of small scale bush meat poaching. Community rangers can also apply for and obtain the status of police reservists mandated to carry firearms under the National Police Service Act.⁴⁰⁶ In such a case, their security function will not be a devolved function but a delegated one because they will be under the supervision of the local KWS warden and police station and will have to report their use and maintenance of their firearms to them.

KWS should also oversee proper benefit sharing mechanism in all community wildlife managed areas. Key among the functions of KWS would be the capacity building of the communities in proper financial management, wildlife management, security and species monitoring. KWS should also be required to encourage community enterprises including encouraging private partnerships in cases of wildlife tourism and encouraging other support nature based enterprises. KWS will need to deconcentrate its structures as it has currently done for easy reach by communities.

⁴⁰⁴ Mbote 'Aligning Sectoral Wildlife Law to the Framework Environmental Law' (n26) 295.

⁴⁰⁵ Lind and Cappon (n260) 7.

⁴⁰⁶ No. 11A of 2011.

At the County level, the Land Administration Committees under the proposed Community Land Bill should be given the function of dispute resolution of various disputes that may arise from community wildlife management including disputes on revenue sharing, disputed local level elections and disputes in grazing rights and zoning of community land to incorporate wildlife. The committee should also act as an appellate level for purposes of decisions made at the local level. The significance of this committee to devolution of wildlife resource management is that it is formed by persons elected directly by communities in various community land areas within the counties. It should thus be empowered to deal with general governance aspects while technical wildlife management issues are referred to the KWS deconcentrated structures on the ground.

The third tier of devolution would be the community level where community members are empowered by the law to manage wildlife for their benefit. In this tier, the law should spell out the rights and duties of communities within these structures. The community wildlife conservancies under the WCMB would be the key governance bodies for wildlife management at community level. The law should provide that in the establishment of such conservancies, the communities come up with a constitution which provides for election of leaders on a regular basis to prevent the capture of benefits by local elites at the expense of the rest of the community.

5.6 PROPOSED LEGISLATIVE CHANGES

One of the first changes should be the transfer of some wildlife management functions to county level through an agreement between the national and county governments. This is to enable county governments participate in governance of wildlife within their areas and to prevent them from raising revenue through charging rates on land set aside by communities for wildlife management and charging taxes on income from wildlife. County governments are also nearer to communities and through their legislative function can legislate specifically on issues affecting wildlife management in their counties to help improve conservation efforts by communities, provided such laws do not conflict with the national wildlife legislation. For example, communities creating marine conservancies in counties at the Coast have major problems with pollution of the marine environment but very few issues with human wildlife

conflict. This is opposed to a conservancy like Ishaqbini Hirola Community Conservancy which is far away from any major town and has few problems of pollution but may have problems with human wildlife conflict especially of primate species within the conservancy.

The WCMB should spell out the functions of communities in managing wildlife within their conservancies. These include the functions already usurped by communities under the silent devolution currently taking place such as wildlife security, HWC management, species monitoring and tourism development. There should be mechanisms to link with KWS in case complex security and HWC interventions are needed. This will go a long way in removing the negative incentive to capture wildlife resources and appropriate them illegally and will also minimize the need and funding put towards policing the resources.⁴⁰⁷ With wildlife becoming a popular land use competing with other land uses, HWC will significantly reduce as non compatible land uses will slowly die away.

Further, the WCMB should provide for the KWS Board of Trustees having more representation from the community as opposed to NGO's and private sector having greater representation. Other proposed changes in the Bill should include doing away with County Wildlife Conservation Committees which are mere instruments of the national government. It should allow for independent community governance structures and to avoid duplication and unnecessary constraints on the budget by creating new institutions should adopt the Land Administration Committees under the Community Land Bill as the institutional structures.

The WCMB should also provide for registration and monitoring of conservancies at the county level through the Land Administration Committees. This is because most community conservancies are far flung and travelling to the Capital City to register a conservancy in KWS would have negative cost and time implications. This would be discouraging to communities which want to establish conservancies on their land. Registration at the local level will also improve monitoring of governance structures and benefit sharing and will put registration of community land rights together with wildlife conservancies in a one stop shop thereby reducing bureaucracies and paper work.

⁴⁰⁷ Mbote, *Property Rights and Biodiversity Management In Kenya* (n43) 30.

Another inclusion in the WCMB is a Development Fund which will include monies allocated by Parliament as well as monies from other lawful sources which will be used to help communities establish wildlife conservancies. This Fund can be vested in KWS as the oversight authority which will then disburse the funds to communities according to their needs. The Fund should be used in funding of capacity building including training of community wildlife managers, accountants and community rangers. It should also be used to build the democratic capacity of community institutions for wildlife conservation such as conservancy boards and management committees. The Fund should also be used in equipping community rangers to enable them carry out the wildlife security and human wildlife conflict mitigation functions which will have been delegated to them by KWS.

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