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ALTERNATIVE DISPUTE RESOLUTION IN THE CRIMINAL JUSTICE SYSTEM IN KENYA

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DECLARATION

I, **DIANA AWINO ORAGO** do hereby declare that this thesis represents my original work to which various sources of information have been duly acknowledged. The work has not been submitted for examination or publication in any academic or research institution and no part of research ought to be produced without my consent or that of the University of Nairobi.

Signature……. **Date……**

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This thesis has been submitted for examination with my approval as the supervisor of the researcher at the University of Nairobi.

Signature……. **Date……**

Dr. Kariuki Muigua

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DEDICATION

I dedicate this project to my family for the immense support that they have given me during my studies. Thank you so much.

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I would like to express my gratitude to Dr. Kariuki Muigua for his valuable and constructive guidance during the development of this work. I wish to thank my family for their support and encouragement during this trying time.

ABSTRACT

Under the current Kenyan constitutional dispensation, ADR mechanisms are taken cognizance of under Article 159 so as to promote access to justice in accordance with Article 48 thereof with regard to intergovernmental disputes, communal land disputes and labour disputes. Nonetheless, the issue of the utilization of ADR mechanisms within the criminal justice system has been contentious. According to section 176 of the Criminal Procedure Code, courts can "promote reconciliation and encourage and facilitate the settlement in an amicable way of proceedings for common assault, or for any other offence of a personal or private nature not amounting to felony, and not aggravated degree." However there has been shocking jurisprudence such as *in R v Mohamed Abdow Mohamed (2013) e KLR* where felonies have been solved through ADR mechanisms. This study therefore sought to establish the boundaries of the application of ADR mechanisms and conclude by making recommendations on the legal, institutional and policy frameworks that would enable the incorporation of ADR mechanism in the criminal justice system. The study found that the boundaries of the application of ADR mechanism are determined by the type of crime, the parties involved and the timing of the application. Furthermore, it established that all applications to apply ADR mechanisms in criminal proceedings must involve the state through the prosecution since the state is also a complainant. Moreover, applications to apply ADR mechanism in criminal proceedings can only be done before a final judgement has been issued, otherwise the application will not be successful since it acceptance would be tantamount to usurping the powers of the courts. The study also found that ADR mechanisms have been applied in criminal proceedings in other jurisdictions such as Australia and Rwanda with great success. This study recommends that in the short term, the National Council on the Administration of Justice issues directions on the boundaries of application of ADR to criminal matters, specifically

on where it can or cannot be applied. It should also come up with policy guidelines that delineates the types of criminal matters where ADR mechanisms can be applied and direct such cases there directly with the supervision of the traditional justice system. In the medium term the National Council on the Administration of Justice should confer with various community leaders, especially in marginalized areas so as to make TDRMs non repugnant to justice which will improve their acceptability and application. In the long term the judiciary should apply special ADR mechanisms such as Family Group Conferencing, Victim Offender Mediation and Healing Circles in the juvenile courts so as to ease the backlog and reduce recidivism. Additionally, both the National Council on the Administration of Justice and the Mediation Accreditation Committee of the Judiciary's pilot programme on Court Annexed Mediation should come up with guidelines that promote the uptake of ADR mechanisms in the Kenyan criminal justice system. This will go a long way in offering restorative justice to the people who need it the most.

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LIST OF ABBREVIATIONS

ADR……Alternative Dispute Resolution.

CPC……. Criminal Procedure Code

CJS……..Criminal Justice System

TJS……...Traditional Justice System.

TDRMS…….Traditional Dispute Resolution Mechanisms

AJS……Alternative Justice System.

RJS…….Restorative Justice System.

VOM……..Victim Offender Mediation.

NCAJ……..National Council on Administration of Justice.

CHAPTER ONE

INTRODUCTION TO ALTERNATIVE DISPUTE RESOLUTION

1.0 Introduction

This chapter introduces the topic of the study by presenting a background, outlining the problem statement, providing a justification for the study and the research objectives. Further, the chapter presents the research methodology, hypothesis and theoretical framework. The chapter concludes by giving a breakdown of the chapters that are included in the paper.

The overall aim of the Criminal Justice System (CJS) in any country is to ensure that justice is done.[1] Justice as defined by Spader is "…our end, our goal, the supreme value in our field and perhaps in society in general."[2] However for a state to ensure the legitimacy of its criminal justice system then it must ensure that it is effective, fair and accessible to all the parties[3] that are involved in the process.[4] However, in Kenya, our criminal justice system is adversarial and retributive in nature.[5] This basically means that the accused person is pit against the state through the prosecution counsel and the role of the criminal court is to dispose of the matter by simply imposing a punishment that according to the court fits the crime as is laid down in the Penal Code.[6] This quote by Alfini J[7] an American scholar is a good description of our CJS and the direction we ought to take. He states as follows:

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[1] Palmer, R. (1997). 'Justice in Whose Interests? A Proposal for Institutionalized Mediation in the Criminal Justice System'. *S. Afr. J. Crim. Just.*, *10*, 33.
[2] Spader, D. J. (1988). 'Criminal justice and distributive justice: Has the wall of separation been reduced to rubble?' *Justice Quarterly*, *5*(4), 589-614.
[3] The parties involved in the process are basically the offender, victim and the society in general
[4] *Supra* (n2).
[5] Muigua, K. (2015, July). Empowering the Kenyan People through Alternative Dispute Resolution Mechanisms. In *CIArb Africa Region Centenary Conference 2015*.
[6] Penal Code Cap 63 Laws of Kenya.
[7] Alfini, J. (1986). 'ADR and the courts: An Introduction', Judicature 252.

> *"The idea of training a lawyer as a vigorous adversary to function in the court room is anachronistic. With court congestion and excessive litigiousness drawing excessive criticism, it is clear that lawyers in the future must be trained to explore non -judicial routes to resolving disputes."*[8]

Moreover, reliance on litigation as the main method of dispute resolution has denied many Kenyans access to justice since there are numerous legal, structural, procedural, institutional, financial and social barriers associated with litigation which hinder Kenyans from accessing justice.[9]

To remedy this, the Constitution of Kenya[10] that was promulgated in 2010 (the Constitution) guarantees that every citizen has the right to access to justice and implores the state through its judicial officers to institute suitable administrative, policy and statutory interventions so as to ensure that the justice system is efficient and effective.[11] So as to deliver this guarantee, the Constitution has increased the number of avenues through which justice can be dispensed through Article 159 which allows for the utilization of Alternative Dispute Resolution (ADR) as an alternative to the court processes that are currently in place.[12] ADR mechanisms are simpler, quicker, more accessible and more affordable than litigation while promoting amicable dispute resolution that builds reconciliation and provides restorative justice for all the parties involved.[13]

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[9] *Supra* (n5)
[10] Constitution of Kenya 2010, Government Printer, Nairobi.
[11] Muigua, K., & Kariuki, F. (2014, July). ADR, Access to Justice and Development in Kenya. In *Strathmore Annual Law Conference 2014* (Vol. 3).
[12] Article 159(2), Constitution of Kenya 2010.
[13] *Supra* (n 5)

Nonetheless, Dr. Kariuki Muigua[14] is of the opinion that even though ADR mechanisms have been formally recognized by the Constitution, they have not been institutionalized in order to create proper legal and policy mechanisms so as to achieve the increased access to justice that was envisaged by the Constitution. This lacuna in the law has slowed down the uptake of ADR mechanisms and also yielded decisions such as *R v Mohamed Abdow Mohamed (2013) e KLR* [15] that caused uproar from the members of the civil society. Brief facts of the case are that the accused person was charged with the murder of one Osman Ali Abdi. The DPP then sought to have the matter marked as settled as the family of the deceased and that of the accused person had reconciled by submitting themselves to traditional and Islamic laws. The DPP based his submissions on Article 159 of the Constitution which allows courts to be guided by alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms; to which the court agreed with those submissions and discharged the accused person. It is against this background that this researcher proposes to examine the place of ADR mechanisms in the criminal justice system in Kenya and the boundaries within which the mechanisms operate. Moreover, this paper will examine the institutional and procedural frameworks that have been put in place to govern ADR mechanisms.

1.1 Background to the Study

Alternative dispute resolution refers to "all those decision-making processes other than litigation including but not limited to negotiation, enquiry, mediation, conciliation, expert determination, arbitration and others".[16] Nevertheless, there have been objections on the usage of the term

[14] *ibid*
[15] Criminal Case No. 86 of 2011, High Court at Nairobi.
[16] Michel, J. (2011). Alternative dispute resolution and the rule of law in international development Cooperation. *J. Disp. Resol.*, 21.

'alternative'[17] since it gives the implication that ADR mechanisms are inferior to litigation while they are independent dispute resolution mechanisms historically precede litigation. Dr. Kariuki Muigua[18] contends that ADR mechanism offer restorative justice as opposed to the retributive justice that is offered by litigation. The aim of restorative justice is to rehabilitate and reconcile the offender with the community while the impetus of retributive justice is to punish the offender rather than rehabilitating them.

ADR mechanisms can be broadly classified into evaluative, determinative or facilitative processes.[19] The aim of carrying out evaluative processes is to ensure that the parties to a dispute understand the salient issues and the probable outcomes of the matter at hand, this evaluative process is carried out by a third party who gives an expert appraisal or an early neutral evaluation of the matter at hand.[20] Determinative processes include arbitration whereby an expert third party makes a determination after both parties have presented their arguments and tabled their evidence.[21] Finally, facilitative processes include mediation which helps the involved parties to pin point the issues that pertain to their dispute and to come to an amicable agreement about the dispute.[22]

Under the current Kenyan constitutional dispensation, ADR mechanisms are taken cognizance of under Article 159[23] so as to promote access to justice in accordance with Article 48[24] thereof with

[17] Muigua, K, *Settling Disputes through Arbitration in Kenya* (3rd edn. Glenwood Publishers Limited
[18] *ibid*
[19] Xie Z (2011, October). 'The Facilitative, Evaluative and Determinative Processes in ADR,' available at http://www.xwqlaw.com/info/c47f5ff15b464882ad5c9a7f97338652, (accessed on 7/03/2018).
[20] *ibid*
[21] *ibid*
[22] *ibid*
[23] Article 159(2) Constitution of Kenya 2010.
[24] *Ibid* Article 48 (1)

regard to intergovernmental disputes, communal land disputes and labour disputes. Nonetheless, the issue of the utilization of ADR mechanisms within the criminal justice system has been contentious. According to section 176 of the Criminal Procedure Code[25], courts can "promote reconciliation and encourage and facilitate the settlement in an amicable way of proceedings for common assault, or for any other offence of a personal or private nature not amounting to felony, and not aggravated degree." However many argue that the decision to discontinue the criminal proceedings in *R v Mohamed Abdow Mohamed (2013) e KLR* [26] was erroneous since the matter was a felony and therefore not within the boundaries of matters than can be resolved through ADR. Moreover, Dr. Kariuki Muigua[27] notes that the decision contravened the Bill of Rights, was repugnant to justice and was inconsistent with the law.[28] This decision brings to the fore the lacuna in the law regarding the legal and policy frameworks that guide ADR mechanisms and the boundaries within which ADR mechanisms can operate in the criminal justice system.

1.2 Statement of the Research Problem

Although ADR mechanism are formally recognized by the Constitution in article 159[29] they have not been institutionalized through the establishment of appropriate legal, institutional and policy frameworks that would enable them to increase access to justice.[30] There are therefore no legal or policy frameworks set up to guide the adoption of ADR and set the boundaries within which the mechanisms should operate especially within the criminal justice system.[31] This lacuna in the law has led to contentious rulings with the most recent and shocking jurisprudence on this is the case

[25] Section 176, Criminal Procedure Code, Cap. 75.
[26] *Supra* (n 5)
[27] *Supra* (n 16) p.22
[28] Article 159(3), Constitution of Kenya, 2010
[29] *ibid*
[30] Muigua, K. (2015) Legitimising Alternative Dispute Resolution in Kenya: Towards a Policy and Legal Framework.
[31] *ibid*

of *R v Mohamed Abdow Mohamed (2013) e KLR* where the accused person was charged with murder and the charges were terminated against the accused person on the basis that the parties had reached a settlement under traditional customs and Islamic laws.[32] In addition to this case more recently cases of defilement and robbery with violence in magistrate's courts all over the country are being withdrawn on grounds that parties have reconciled through ADR mechanisms.[33]

Dr. Kariuki Muigua[34] opines that the application of ADR in the criminal justice system is especially contentious since while Article 159[35] allows for the utilization of ADR mechanisms, it limits their application in section (3) by stating that they cannot be used if "(a) they contravene the Bill of Rights; (*b*) if they are repugnant to justice or morality; or (c) is inconsistent with the Constitution or any written law". The rationale behind subjecting some elements of ADR such as Traditional Justice Systems (TJS) to the repugnancy test is that some of their elements are not in line with the Bill of Rights or are discriminatory against women, children or the disabled.[36] This test of repugnancy has led to the limitation of the scope within which customary laws can apply; this is despite the fact that while Customary Law[37] is considered as a source of law in Kenya, its application is restricted by the Magistrates' Court Act[38] to specific civil matters such *inter alia* marriage, divorce, maintenance and land.[39] Nevertheless, this disambiguation has not been made with regard to ADR mechanisms which include TJS mechanisms.[40] It is against this background

[32] *Supra* (n 16)
[33] *ibid*
[34] *Supra* (n 28)
[35] Article 159(3), Constitution of Kenya, 2010
[36] Elechi, O. O. (2004, August). Human Rights and the African Indigenous Justice System. In *Paper for presentation at the 18th International Conference of the International Society for the Reform of Criminal Law* (pp. 8-12).
[37] Section 3(2), Judicature Act, Cap. 8.
[38] Section 2, Magistrates' Courts Act, Cap. 10.
[39] *ibid*
[40] *Supra* (n 28)

that this study proposes to examine the boundaries within in which ADR mechanisms can be applied in the criminal justice system. Further, this study will establish the boundaries of the application of ADR mechanisms and conclude by making recommendations on the legal, institutional and policy frameworks that would enable the incorporation of ADR mechanism in the criminal justice system.

1.3 Justification for the Research

The researcher intends to determine the effectiveness of ADR mechanisms within the Kenyan criminal justice system, further make a comparison with other jurisdictions on how effective ADR is in their CJS and what best practices can be borrowed from those jurisdictions. Moreover, the study will establish the extent to which ADR mechanisms should apply in the Kenyan criminal justice system and consequently come up with concrete recommendations on the legal, institutional and policy frameworks that would enable the incorporation of ADR mechanism in the criminal justice system.

1.4 Objectives of the Research

i. To determine the effectiveness of ADR mechanisms in the Criminal justice system.
ii. To determine the boundaries of the application of ADR mechanism within the Criminal justice system.
iii. To come up recommendations on the legal, institutional and policy frameworks that would enable the incorporation of ADR mechanism in the criminal justice system.

1.5 Research Questions

i. How effective are ADR mechanisms in the criminal justice system?

ii. To what extent should ADR mechanisms be applied in the criminal justice system?

iii. What are the legal, institutional and policy frameworks that would enable the incorporation of ADR mechanism in the criminal justice system?

1.6 Research Methodology

The study will use qualitative research methodology using secondary sources of data. The secondary sources will include: statutes, journals, newspaper articles and relevant textbooks on the subject of the ADR and its application within the criminal justice system. The study used these secondary resources to carry out a comparative study of how ADR is applied in different jurisdictions such as Rwanda and Australia with the aim of drawing conclusions and offering recommendations on how it can be applied in Kenya within the CJS.

1.7 Hypothesis

The research hypothesis that will guide this study is at ADR mechanisms are effective within some parameters in the criminal justice system. As follows:

H_1: ADR mechanisms are effective in the criminal justice system

H_2: ADR mechanisms can be applied in the criminal justice system

H_3: There are legal, institutional and policy frameworks that would enable the incorporation of ADR mechanism in the criminal justice system

1.8 Theoretical Framework

The theoretical framework adopted in this study will be the utilitarianism theory[41] which states that most ideal way of evaluating a law is by evaluating its ability to generate the "greatest

[41] Cross, R., & Harris, J. W. (1991). *Precedent in English law*. Clarendon Press.

happiness for the greatest number" of people. This theory is associated with the works of John Stuart Mill and Jeremy Bentham[42] who laid the philosophical and jurisprudential ground work for the theory of utilitarianism. This theory contends that an action can only be right if it is prescribed by a rule which meets the threshold of being an ideal rule.[43] Similarly, a rule can only be deemed to be ideal if its acceptance and obedience by the majority yields superior consequences than any other rule that governs a similar act.[44] This theory is applicable to this study since the application of ADR mechanisms in the criminal justice system is dependent on how ideal the rule is according to the theory of utilitarianism. Further, the boundaries of the application of ADR mechanisms can be determined through examining the superiority of its consequences as compared to the consequences of applying the current litigation system through the CPC. While this theory has negative human rights implications in that an individual's rights can be violated for the sake of the happiness of a greater group of people, it is still useful in this study because some ADR mechanisms have been said to be repugnant to justice.

Restorative justice is a theory of justice that emphasizes repairing the harm caused by criminal behavior.[45] It is best accomplished through cooperative processes that include all stakeholders. This can lead to transformation of people, relationships and communities. Restorative justice theory and programs have emerged over the past 35 years as an increasingly influential world-wide alternative to criminal justice practice. The traditional criminal justice system defines and seeks to protect individuals' rights through formal, adversarial processes. Restorative justice places

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[42] Bentham, J. (1996). *The collected works of Jeremy Bentham: An introduction to the principles of morals and legislation*. Clarendon Press.
[43] *ibid*
[44] *ibid*
[45] Restorative Justice Org. (n.d.). Restorative Justice. Retrieved from http://restorativejustice.org/restorative-justice/about-restorative-justice/tutorial-intro-to-restorative-justice/lesson-4-conceptual-issues/#sthash.1VPAlsVT.dpbs

a high value on individuals voluntarily assuming responsibilities and seeking to resolve conflict through informal processes.[46] Criminal justice clarifies and upholds norms through enforcement of laws. Restorative justice relies more on conversations about norms in the context of specific instances of wrongdoing and the resulting harm.[47] This theory is applicable to this study since the application of ADR mechanisms in the criminal justice system is a form of a restorative justice in a criminal justice system that is retributive. This theory shows the benefits of a restorative system and how it can be beneficial in a retributive system.

1.9 Conceptual Framework

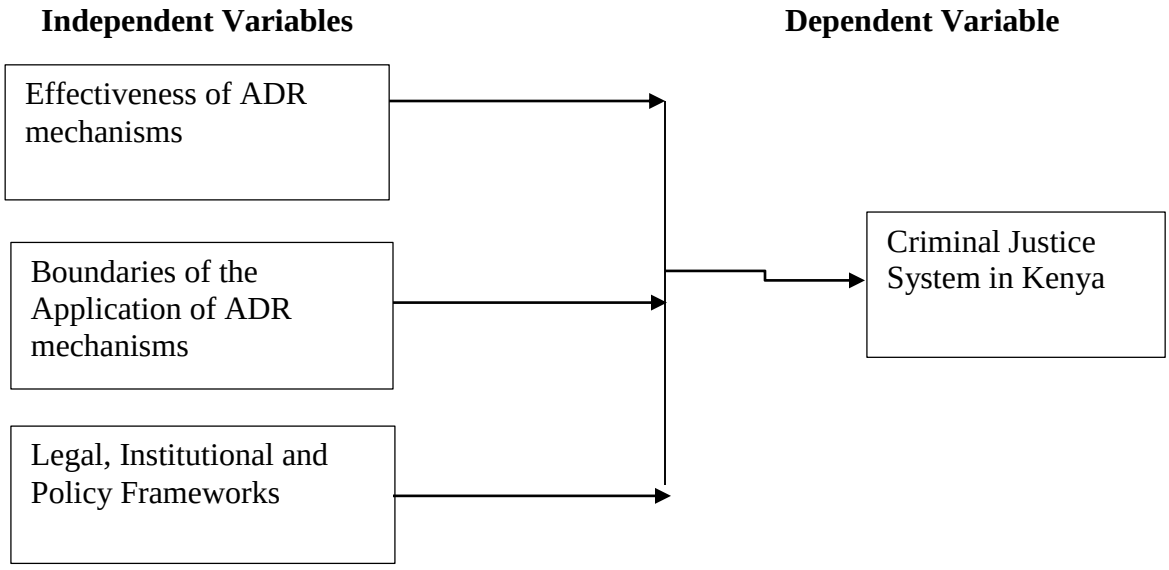

Figure 1.1: Conceptual Framework

Source: Author, 2018.

This study is based on the premise that the application of ADR in the CJS in Kenya is based on the effectiveness of ADR mechanisms, the boundaries of the application of ADR mechanisms in

[46] Van Ness, D. W., & Strong, K. H. (2014). *Restoring justice: An introduction to restorative justice*. Routledge.
[47] *Supra* (n.46)

the criminal justice system and the legal, institutional and policy frameworks that will govern the application of ADR in the CJS in Kenya.

1.10 Literature Review

The aim of this review is to present the extent of previous research on the application of ADR in the criminal justice system in order to identify the gap that this study intends to fill. Different scholars laud the application of the different dispute resolution methods in the criminal justice system.

International Context

A report by Lewis and McCrimmon[48] titled *"The Role of ADR Processes in the Criminal Justice System: A view from Australia"* conceptualizes ADR mechanisms within the Australian criminal justice system and reports that mediation and conferencing programs are used but mostly for juvenile and indigenous offenders. The writers further opine that in the criminal justice context, ADR includes a number of practices which are not considered part of the traditional criminal justice.[49]

Alamin[50] in his paper "*Introducing Alternative Dispute Resolution in Criminal Litigation: An Overview"* focuses on how plea bargaining as a form of ADR can be incorporated in the criminal

[48] Lewis, M., & McCrimmon, L. (2005, September). The role of adr processes in the criminal justice system: A view from Australia. In *Association of Law Reform Agencies of Eastern and Southern Africa (ALRAESA) Conference, Imperial Resort Beach Hotel, Entebbe, Uganda* (pp. 4-8).

[49] Ibid. The practices include Family Group Conferencing, Victim Offender Panels, sentencing circles, plea bargaining, community crime prevention programs etc.

[50] Alamin, M. (2015). Introducing Alternative Dispute Resolution in Criminal Litigation: An Overview". *Journal of Research in Humanities and Social Science*, *3*(11), 68.

justice system. He notes that plea bargaining should be developed and incorporated in the main Criminal Law Statutes in Bangladesh. He further concludes that "ADR method in criminal litigation can serve as practical vehicles for promoting rule of law and other upgrading objectives. Properly studied ADR programs, undertaken in appropriate conditions, can support court reform, improve access to justice, increase disputant satisfaction with outcomes, reduce delay, and reduce the cost of resolving disputes."[51]

Another scholar in Bangladesh, Mohamed Chowdhury in his paper *"An Overview of the Practice and Prospect of Alternative Dispute Resolution in Criminal Justice System in Bangladesh: Promotion of Access to Justice"*[52] opines that ADR has not yet been broadly initiated in Bangladesh. He goes on to identify two types of ADR i.e. 'Compounding of Offence' which is basically the amicable settlement of a dispute with or without the permission of the court. The other type of ADR that Chowdhury identifies is plea bargaining. He goes on to note that plea bargaining has not gained any latitude in the Criminal Justice System of Bangladesh though it can be used as a tool for the smooth functioning of ADR in the CJS of Bangladesh.."[53]

African Context

Obiere Fernandez[54] in his article titled *ADR and the Nigerian Criminal Justice System a Union Necessary for the Attainment of True Justice* opines that "there are certain facts, processes and laws that stand against the successful adoption and implementation of ADR and restorative justice

[51] Ibid, 68.
[52] Chowdhury M.A.A (2018), An Overview of the Practice and Prospect of Alternative Dispute Resolution in Criminal Justice System in Bangladesh: Promotion of Access to Justice. *Int. J. Adv. Res. 6(11), 712-721.*
[53] *Ibid*
[54]Obiere F. (2017), ADR and the Nigerian Criminal Justice System a Necessary Union for the Attainment of True Justice at https://www.academia.edu/Documents/in/THE_ROLE_OF_ALTERNATIVE_DISPUTE_RESOLUTION_IN_NIGERIA_CRIMINAL_JUSTICE accessed on 17/9/2019.

in the Nigerian Criminal Justice System."[55] He goes on to state that even though there's some level of ADR being practiced in the Nigerian CJS, the practices are "unregulated and arbitrary" and further that there are no set down rules on how the same should be practiced. Prof. Nwosu Kevin in his article *Criminal Justice Reforms in Nigeria: The Imperative of Fast Track Trials, Plea Bargains, Non-Custodial Options and Restorative Justice*[56]just like Obiere also notes that there's a need for the adoption of mechanisms and practices that will help reduce the case load in the Nigerian CJS. He notes that once ADR processes[57] are mainstreamed then they can provide the necessary relief to backlog. In addition he opines that there's "…a need for a comprehensive, systematic and structured programme of training and capacity building..." on ADR. Olufemi and Mosemi[58] both Nigerian Scholars propose for the possible merging of ADR, African Culture and Restorative Justice into the Nigerian Criminal Justice System. This proposition draws out the fact that ADR is not fully adopted/ integrated in the Nigerian Criminal Justice System. Furthermore, Ogbuabor, Nwosu and Ezike[59] in their article Mainstreaming ADR in Nigeria's Criminal Justice System agree that the applicability of ADR in criminal matters is only but a recent trend though mostly restricted to misdemeanors/ minor criminal disputes/charges against adults. The authors further posit that ADR should be mainstreamed into the Nigerian CJS and further that is should apply not only to minor offences but also to serious offences (felonies). They further argue that

[55] Ibid.
[56] Nwosu K (2010), Criminal Justice Reforms in Nigeria: The Imperative of Fast Track Trials, Plea Bargains, Non-Custodial Options and Restorative Justice accessed at www.nigerialawguru.com/aricles/criminal%20law%20and%20procedure/CRIMINAL%20JUSTICE%20REFORMS%20IN%20NIGERIA.pdf on 17/9/2019.
[57] Fast track trials, non-custodial options, plea bargaining and restorative justice.
[58] Olufemi O., Imosemi A. (2013), Alternative Dispute Resolution and the Criminal Justice System: A Possible Synergy as Salve to Court Congestion in the Nigerian Legal System. Arabian Journal of Business and Management Review(Nigerian Chapter) Vol.1 No. 10,2013
[59] Ogbuabor, Nwosu, Ezike (2014), Mainstreaming ADR in Nigeria's Criminal Justice System at European Journal of Social Science Vol. 45 (No.1) pp32-43.

ADR should be seen as authentic dispute resolution method rather than alternative dispute resolution.

R. Palmer[60] a South African scholar asserts that "…there can be little doubt that victims of crime are effectively marginalized by the present system of criminal procedure in South Africa." He goes on to propose for the institutionalization of mediation (one of the various methods of ADR) as an integral part of the institutional court structure. He argues that institutionalization will be vital in that the independent mediator's office would work in close conjunction with the prosecution and the judicial officers and assist them in exercising their various discretions more justly and efficiently.[61] Palmer in his article concludes that the introduction of a criminal court mediator in the CJS would play an integral part in ensuring a just, accessible and effective system of criminal justice in the new South Africa.[62] Alfini[63] also agrees with Palmers assertion on the institutionalization of ADR and states that "…the recent judicial interest in ADR may represent an abandonment of interest in more traditional administrative and procedural reforms."[64]

Kenyan Context

In the Kenyan context Dr. Kariuki Muigua[65] wrote a paper titled "*ADR: The Road to Justice in Kenya*" which traces the development of ADR mechanisms in Kenya and the role that they play in improving access to justice. This study will borrow from this paper on matters regarding the

[60] Palmer, R. (1997). 'Justice in Whose Interests-A Proposal for Institutionalized Mediation in the Criminal Justice System'. *S. Afr. J. Crim. Just., 10*, 33.
[61] Ibid.
[62] Ibid.
[63] *Supra* (n 1)
[64] *Ibid*.
[65] Muigua, K. (2014). ADR: The Road to Justice in Kenya. *Chartered Institute of Arbitrators (Kenya Branch)*

history of ADR in Kenya. On the other hand a paper by Kariuki[66] titled "*Applicability of Traditional Dispute Resolution Mechanisms in Criminal Cases in Kenya"* provides a background on the existing arguments for and against the application of various ADR mechanisms such as TJS within the Kenyan context.

Further a paper by Keriako Tobiko[67] on "*The Relationship between Formal Rule of Law and Local Traditional Justice Mechanisms*" highlights the various TJS systems in Kenya and the issues that need to be addressed so as to promote the mainstreaming of TJS systems which are a type of ADR mechanisms. Francis Kariuki in his article *Applicability of Traditional Dispute Resolution Mechanisms in Criminal Cases in Kenya: Case Study of Republic V Mohammed Abdow (2013) eKLR*[68] opines that customs, unwritten laws and traditions are strongly intertwined and because of this connection traditional justice systems may in certain circumstances be the most appropriate way of dealing with criminal matters. In essence what the author implies is that ADR methods should most definitely be used to compromise criminal cases whether they are misdemeanors of felonies. He however adds a rider that so long as the traditional justice systems are not repugnant to justice and morality, do not contravene the Bill of Rights and are not inconsistent with the Constitution or any written law then there should be no bar to its applicability so long as the parties consent to its use. He bases this argument on the fact that judicial authority is a derivative of the people and therefore courts should allow the people whom it derives its powers from settle disputes in the best way they think fit.

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[66] Kariuki F. (2014), Applicability of Traditional Dispute Resolution Mechanisms in Criminal Cases in Kenya: Case Study of Republic v Mohammed Abdow (2013) eKLR (2014) . Alternative Dispute Resolution Journal.

[67] Tobiko, K. (2013, September). The Relationship between Formal Rule of Law and Local Traditional Justice Mechanism. In *A paper presented at the 18th IAP Annual Conference and General Meeting, Moscow, Russia, 8th-12th September*.

[68] Kariuki F. (2014), Applicability of Traditional Dispute Resolution Mechanisms in Criminal Cases in Kenya: Case Study of Republic v Mohammed Abdow (2013) eKLR *(2014) 1 Alternative Dispute Resolution Journal.*

Mwaniki Gachoka and Memba in their article "*An appraisal on the jurisprudential and precedential leaps institutionalizing the ideals of ADR in the Kenyan Criminal Justice System"* agree that the use of ADR mechanisms are important in our criminal justice system and that they further advocate for procedural mechanisms to be put in place that will enable the full implementation of ADR mechanisms in the Kenyan Criminal Justice System.[69] Another paper by Muigua[70] on "*Legitimizing Alternative Dispute Resolution in Kenya: Towards a Policy and Legal Framework"* offers recommendations on the best ways to institutionalize ADR mechanisms in Kenya so as to promote access to justice. Teddy Musinga in his paper *Integration of Customary Law Concepts Unto Kenya's Criminal Justice System: A Commentary on Lenchura and Mohamed Abdow Cases*[71] asserts that customary law is not an inferior source of law and that it should be integrated into the CJS which will lead to the creation of an indigenous Kenyan jurisprudence. It is worthy to note that the works of the various authors enumerated above are similar in that all of them advocate for the institutionalization of the various forms of alternative dispute resolution. This in turn helps the researcher in coming up with recommendations of this study.

From the foregoing literature review, it is evident that ADR processes are yet to be fully institutionalized in the various Criminal Justice Systems in most countries. It thus follows that there emerges a gap since no study has been undertaken to establish the effectiveness of ADR mechanisms in the criminal justice system or to determine the boundaries within which ADR mechanisms should operate within the criminal justice system. This is the gap that this study

[69] Paul M. Gachoka, S. Memba, 'An appraisal on the jurisprudential and precedential leaps institutionalizing the ideals of ADR in the Kenyan Criminal Justice System' (2019) 7 (1) Alternative Dispute Resolution Journal.
[70] *Supra* (n 28)

[71] Musiga, Teddy, Integration of Customary Law Concepts unto Kenya's Criminal Justice System: A Commentary on Lenchura and Mohamed Abdow Cases (March 1, 2016). The Law Society of Kenya Journal, Volume 12(2) (2016). Available at SSRN: https://ssrn.com/abstract=3159043

intends to fill by finding out and recommending policy, institutional and legal frameworks that can be used to help with the implementation of ADR in the criminal justice system.

1.11 Chapter Breakdown

This study will be composed of five distinct chapters. The first chapter of this study will give an introduction of the study to be undertaken, the background to the study, the problem statement and the research methodology adopted in conducting the research. The second chapter will present a comprehensive analysis of the background of alternative dispute resolution in Kenya and the various mechanisms that make up ADR in Kenya. The third chapter will comprehensively analyze the effectiveness of ADR in the criminal justice system in Kenya. Further, the fourth chapter will present lessons on the extent of the applicability of ADR mechanisms within the criminal justice system with a special focus on Kenya, Rwanda and Australia. Finally, chapter five will set out the conclusion and recommendations on the legal, institutional and policy frameworks that would enable the incorporation of ADR mechanism in the criminal justice system.

1.12 Conclusion

This chapter has presented the constitutional underpinnings of the application of ADR in the Kenyan legal system and also presented instances where ADR has been used in the criminal justice system and the controversies that have arisen. The chapter has also defined the research problem and outlined the areas that the study will focus on which are the effectiveness of ADR, the boundaries of its application in the CJS and the legal and policy frameworks that are needed. Further, the chapter has provided a review of previous literature from all over the world which explains and evaluates the utilization of ADR in the criminal justice system.

CHAPTER TWO

BACKGROUND OF ADR MECHANISMS IN KENYA

2.1 Introduction

This chapter will present a comprehensive analysis of the background of alternative dispute resolution in Kenya and the various mechanisms that make up ADR in Kenya.

2.2 Background of ADR in Kenya

Dr. Kariuki Muigua[1] is of the opinion that the presence of ADR mechanisms in Kenya precedes the advent of the colonial rule in Kenya. In pre-colonial Kenya, ADR mechanisms such as arbitration, mediation and reconciliation were practised under the auspices of the Traditional Justice Systems (TJS) that existed in various Kenyan communities[2]. The TJS was administered by clan and community elders who resolved all disputes that arose regardless of their nature since there was no distinction of matters as either criminal or civil in nature. The TJS mechanisms were anchored on the cultures, traditions and beliefs that were held by these communities[3].

The colonization of Kenya by Britain heralded a turning point in the legal landscape of Kenya through the introduction of the English legal system whose supremacy superseded that of TJS systems.[4] After this change in the legal system of Kenya TJS systems were only applicable in so far as they did not contradict any existing written law and could withstand the non-repugnancy test. The first ADR mechanism to be formally recognized by the Kenyan legal system was

1 Muigua, K. (2015) Legitimising Alternative Dispute Resolution in Kenya: Towards a Policy and Legal Framework.
[2]Michel, J. (2011). Alternative dispute resolution and the rule of law in international development Cooperation. J. Disp. Resol., 21.
[3] Ghai, Y. P., & McAuslan, P. (1970). Public law and political change in Kenya: A study of the legal framework of government from colonial times to the present. Oxford University Press.
[4] Gakeri, J. (2011). Placing Kenya on the Global Platform: An Evaluation of the Legal Framework on Arbitration and ADR. *International Journal of Humanities and Social Science*, *1*(6).

arbitration which was introduced in 1914 as the Arbitration Ordinance which gave total control over the arbitration process to the Courts.[5] This ordinance has been amended over the years with the last amendment being in 2009 which ushered in the Arbitration Act.[6]

Other than the Arbitration Act, there are other laws in Kenya which expressly call for the utilization of ADR mechanisms such as the Civil Procedure Act,[7]the Employment Act,[8]the Labour Relations Act[9] and the Labour Institutions Act.[10] ADR mechanisms are also recognized in the Environment and Land Act[11] provides for the utilization of ADR mechanisms as follows;

> *"(1) Nothing in this Act may be construed as precluding the Court from adopting and implementing, on its own motion, with the agreement of or at the request of the parties, any other appropriate means of alternative dispute resolution including conciliation, mediation and traditional dispute resolution mechanisms in accordance with Article 159(2)(c) of the Constitution.*
>
> *(2) Where alternative dispute resolution mechanism is a condition precedent to any proceedings before the Court, the Court shall stay proceedings until such condition is fulfilled."*

ADR mechanisms were fully integrated into the Kenyan legal system as dispute resolution mechanisms by the Constitution of Kenya in the year 2010[12]. The adoption and utilization of ADR

[5] Muigua, K. (2016). Emerging Jurisprudence in the Law of Arbitration in Kenya: Challenges and Promises.
[6]Arbitration Act No. 4 of 1995(As amended in 2009)
[7] Chapter 21 of the Laws of Kenya
[8] Employment Act No. 11 of 2007
[9] Labour Relations Act No. 14 of 2007
[10] Labour Institutions Act No. 12 of 2007
[11] Environment and Land Court Act No. 19 of 2011
[12] Constitution of Kenya 2010, Government Printer, Nairobi.

mechanisms were provided for under Article 159 (2) (c)[13] which states that "alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted." Nevertheless, the application of the ADR mechanisms is limited by clause 3 of Article 159[14] which states that they cannot be utilized if "(a) they contravene the Bill of Rights; (*b*) if they are repugnant to justice or morality; or (c) is inconsistent with the Constitution or any written law".

2.3 ADR Mechanisms in Kenya

ADR refers to other dispute resolution mechanisms other than litigation.[15]The Constitution of Kenya recognizes the following ADR mechanisms; reconciliation, mediation, arbitration and traditional dispute resolution mechanisms which are going to be further discussed in this section.

2.3.1 Reconciliation

The process of reconciliation involves a conciliator whose role is to repair the relationship between the conflicting parties, providing clarification of the pertinent issues and bringing attention to error in perception about the dispute with the aim of bringing together the disputing parties.[16] During these proceedings, the conciliator does not have to be of a neutral standpoint, their aim is to create an environment which will foster open communication between the disputing parties that will lead to further dispute resolution through other ADR mechanisms such as negotiation.[17] This ADR mechanism is used when the disputing parties are reticent incapacitated or ill prepared to participate in any other ADR mechanisms.

[13] *ibid*
[14] *ibid*
[15] Kariuki, D. M. (2012). Alternative Dispute Resolution and Article 159 of the Constitution.
[16] *Ibid*
[17] *Ibid*

Reconciliation is provided for in the Employment Act[18] when there are issues related to unfair termination or when one is dismissed summarily. The Act[19] states that:

> *"A labour officer who is presented with a claim under this section shall, after affording every opportunity to the employee and the employer to state their case, recommend to the parties what in his opinion would be the best means of settling the dispute in accordance with the provisions of section 49."*

This section alludes to the need for reconciliation efforts by the labour officer in charge of the matter through recommending the most suitable dispute resolution mechanism according to the law. Furthermore, the Labour Institutions Act[20] expressly provides reconciliation as a suitable dispute resolution mechanism in Section 12(9)[21] as follows;

> *"The Industrial Court may refuse to determine any dispute before it, other than an appeal or review, if the Industrial Court is not satisfied that an attempt has been made to resolve the dispute through conciliation."*

Moreover the Labour Relations Act[22] provides for reconciliation when there is a trade dispute so as to help solve the dispute through creating a fact finding mission and issuing proposals or recommendations to the disputing parties.[23]

[18] *Supra*(n8)
[19] *Ibid*
[20] *Supra*(n9)
[21] *Ibid*
[22] *Supra*(n9)
[23] *Ibid*

2.3.2 Mediation

The process of mediation involves the inclusion of a neutral third party, who is acceptable to both disputing parties, into a negotiation process that has reached an impasse[24]. This ADR mechanism is provided for in article 159 (2)[25] of the constitution of Kenya. The role of the mediator is to offer solutions to the disputing parties and to create an environment that fosters the achievement of concessions that are acceptable to both parties.[26] The presence of a mediator improves the countenance of both parties and is cost effective, simple and faster than litigation.[27] Nevertheless, the process of mediation faces several challenges with the greatest challenge being that it is fully voluntary and that its decisions are not binding to the disputing parties.[28] This means that the success of the mediation process is fully dependent on the goodwill of the disputing parties and their willingness to continue abiding to the agreements made during mediation. There are also challenges of imbalance in power[29] which might favour the more powerful party and create distrust in the weaker party. Further, the process of mediation can be never-ending[30] if there is no concession among the disputing parties.

2.3.3 Arbitration

The process of arbitration involves the resolution of formal disputes through a private tribunal that is chosen by the parties to the dispute.[31] The private tribunal is administered by a competent and neutral third party who is either appointed by the parties to the dispute or a relevant appointing

[24] Kariuki, D. (2011). *Resolving Environmental Conflicts through Mediation in Kenya* (Doctoral dissertation, School of Law, University of Nairobi).
[25] *Supra*(n12)
[26] Muigua, K. (2014). ADR: The Road to Justice in Kenya. Chartered Institute of Arbitrators (Kenya Branch).
[27] Mwagiru, M. (2006). Conflict in Africa: Theory. *Processes and Institutions of Management*.
[28] *Supra*(n26)
[29] Baylis, C., & Carroll, R. (2005). Power Issues in Mediation. *ADR Bulletin*, *7*(8), 1.
[30] *Ibid*
[31] Sutton, D. S. J., Gill, J., & Gearing, M. (2003). *Russell on arbitration*. Sweet & Maxwell.

authority.[32] This third party gives a decision or an award that is binding and final at the end of the arbitration process. Nonetheless, arbitration has benefits such as confidentiality, speediness, efficiency, affordability, flexibility and the fact that its decisions are binding.[33] Muigua[34] describes the process of arbitration as both adversarial and very similar to litigation since it highly regulated by the court system.

Arbitration in Kenya is guided by the Arbitration Act of 1995[35] which delineates the situation whereby the Court can intervene in arbitration issues by stating in section 10[36] that "except as provided in this Act, no court shall intervene in matters governed by this Act." The Act allows the Court to rule on the request to stay legal proceedings[37] and refer the matter to arbitration. The Court can refer a matter to arbitration if it was covered in an arbitration agreement and one of the parties moved to court in contravention of the arbitration agreement. The Courts can also issue interim orders[38] to maintain the status quo while the arbitration proceedings go on. The Act also gives the Courts powers to determine the jurisdiction[39] of the arbitral tribunal and to limit it to matters in which the tribunal has sufficient competence in. the High Court also has the power to issue interim orders of protection[40] and to set aside the award given during arbitration after an appeal by one of the disputing parties. The High Court can only set aside[41] the arbitral award according to the stipulations of the Act which include; incapacitation of one of the parties, lack of issuance of a proper notice of arbitral proceedings, existence of laws that govern the dispute which

[32] *Supra*(n26)
[33] *Ibid*
[34] *Ibid*
[35]Arbitration Act No. 4 of 1995(As amended in 2009)
[36] *Ibid*
[37] *Supra* (n35)
[38] Section 7 of the Act
[39] Section 17(1) of the Act
[40] Section 18(1) (a) of the Act (2009 Amendment)
[41] Section 35(1) of the Act

invalidate the award and lack of agreement by the parties over the composition of the arbitral tribunal.[42]

2.3.4 Negotiation

Negotiation is any form of communication between two or more people for the purpose of arriving at a mutually agreeable solution.[43] In a negotiation the disputants may represent themselves or they may be represented by agents and whatever the case, whether they are represented or not represented, they have control over the negotiation process. When attempts are made to settle matters out of court involves negotiations

There are two extreme styles of negotiating. There is what is referred to as the competitive bargaining style and co-operative bargaining style or hard bargaining and soft negotiating. [44]The competitive negotiators are so concerned with the substantive results that they advocate extreme positions. They create false issues, they mislead the other negotiator, they even bluff to gain advantage. It is rare that they make concessions and if they do, they do so arguably, they may even intimidate the other negotiator.[45] Cooperative negotiators are more interested in developing a relationship based on trust and cooperation they are therefore more prepared to make concessions on substantive issues in order to preserve that relationship.

2.3.5 Conciliation

Conciliation is done by a conciliator who brings together parties that are not willing to negotiate thus providing a chance for communication and reducing tension between the disputing parties.[46]

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[42] Section 35(2) of the Act
[43] Supra(n26)
[44] *ibid*
[45] *ibid*
[46] Supra(n26)

The conciliator does not have to be a neutral party, unlike a mediator and their main aim is to restore the status quo.

2.3.6 Convening

Convening is done by a neutral party known a convenor who brings together the contesting parties so that they can negotiate and come up with a solution to a specific controversial issue.[47]

2.3.7 Ombudsman

An ombudsman is a person who investigates complaints and attempts to assist the disputants to reach a decision. Usually this is an independent officer of the government or a public or quasi-public body.

2.3.8 Traditional Dispute Resolution Mechanisms

Traditional Dispute Resolution Mechanisms (TDRM) is the conflict resolution mechanisms that are applied by Kenyan communities to solve disputes that have existed since time immemorial.[48] TDRMs are based on the TJS and are passed on from one generation and were the sole dispute resolution mechanism before the introduction of the English legal system.[49] TDRMs are also referred to as customary, communal, informal, African or indigenous dispute resolution mechanisms. These traditional mechanisms are presided over by clan and community elders[50] and employ mechanisms such as mediation, reconciliation and negotiation. The main impetus of TDRMs is to rehabilitate the offender, foster good community relations and reconcile the disputing parties. [51]This characteristic sets them apart from litigation which is highly adversarial and

[47] *ibid*
[48] Muigua, K. (2015, July). Empowering the Kenyan People through Alternative Dispute Resolution Mechanisms. In CIArb Africa Region Centenary Conference 2015.
[49] *Ibid*
[50] *ibid*
[51] Cloke, K. (2005). The Culture of Mediation: Settlement vs. Resolution. *The Conflict Resolution Information Source*.

retributive. TDRMs are also cost effective, faster, and easily accessible to the people, employ the language of the people and foster reconciliation.[52]

The place of TDRMs in the Kenyan legal system is clearly demarcated by Article 159 (2) (c) [53]of the Constitution which directs judicial officers to adopt ADR mechanisms such as TDRMs when exercising their judicial authority. Nevertheless, this direct is subject to clause 3[54] of the same article which states that these ADR mechanism including TDRMs shall only be applied if they "(a) they contravene the Bill of Rights; (b) if they are repugnant to justice or morality; or (c) is inconsistent with the Constitution or any written law". This non repugnancy clause is especially relevant to TDRMs since most African communities were patriarchal and thus did not respect the rights of women[55], children or the disable. Some punishments within the TDRMs such as caning,[56] cursing and banishment form the community are repugnant justice and morality.

2.4 Conclusion

This chapter has presented a general overview or background to the application of ADR mechanisms in Kenya from the colonial era to the present. Further, it has expounded on the ADR mechanisms that are in use in the Kenyan justice system such as reconciliation, mediation, arbitration and TDRM. The next chapter goes on to specifically address the application of these ADR mechanisms in the Criminal Justice System in Kenya.

[52] *Ibid*
[53] *Supra* (n12)
[54]*ibid*
[55] Adan, M., & Pkalya, R. (2006). *A Snapshot Analysis of the Concept Peace Committee in Relation to Peacebuilding Initiatives in Kenya: Practical Action 2006*. Practical Action.
[56] Kameri-Mbote, P. (2004). Towards greater access to justice in environmental disputes in Kenya: Opportunities for intervention. *IELRC Working Paper*

CHAPTER THREE

APPLICATION OF ADR MECHANISMS IN THE CRIMINAL JUSTICE SYSTEM IN KENYA

3.1 Introduction

This chapter will comprehensively analyse the application and effectiveness of ADR in the criminal justice system in Kenya. It will answer the research question of 'To what extent should ADR mechanisms be applied in the criminal justice system?'

3.2 The Applicability of ADR in the Criminal Justice System

The application of ADR mechanisms in the Criminal justice is provided for in the Constitution in Article 159 (2)[1] as earlier discussed which allows judicial officers to allow for the utilization of ADR mechanisms in the course of dispensing their legal duties. Nonetheless, Article 159(3)[2] continues to limit the application of ADR mechanisms to when they pass the repugnancy test which involves respect for the Bill of Rights, respect to justice and consistence with the Constitution and other laws that are written. The spirit of the Constitution[3] in formally recognizing ADR mechanisms within the legal system was to confirm that they are valid forms of conflict management and to increase access to justice[4] especially among rural communities since litigation is expensive, time consuming, complicated and inaccessible to most Kenyans. Nevertheless, the Constitution retained the repugnancy test[5] since there are aspects of some ADR mechanisms such

[1]Constitution of Kenya 2010, Government Printer, Nairobi.
[2]Article 159(3), Constitution of Kenya, 2010
[3] *Supra*(n1)
[4] Muigua, K. (2015, July). Empowering the Kenyan People through Alternative Dispute Resolution Mechanisms. In CIArb Africa Region Centenary Conference 2015.
[5] *Supra*(n1)

as TDRMs that do not conform with the Bill of Rights such as corporal punishment, sexism and little regard for the rights of children and people living with disabilities.[6]

Within the criminal justice system, Section 176 of the Criminal Procedure Code (CPC)[7] allows for the application of ADR mechanisms as follows;

> *"In all cases the court may promote reconciliation and encourage and facilitate the settlement in an amicable way of proceedings for common assault, or for any other offence of a personal or private nature not amounting to felony, and not aggravated in degree, on terms of payment of compensation or other terms approved by the court, and may thereupon order the proceedings to be stayed or terminated."*

The statement above shows that the CPC allows for the application of ADR mechanisms such as TDRMs in criminal matters but limits it to misdemeanours and not capital offenses.[8] In this case the role of the Court is to ensure that the compensation or any other resolutions that may be reached by these parties is not repugnant and is in line with Article 159(3)[9]. Additionally, a complainant in a criminal case has the right to withdraw the case any time before the final ruling is made by the Court as long as they satisfy the court that there are sufficient grounds for this withdrawal, this is captured in section 204 of the CPC[10]. This implies that Section 204 of the CPC can be invoked to terminate criminal proceedings on the grounds that the parties have reconciled through ADR mechanisms such as TDRMs.[11]

[6] *Supra*(n2)
[7] Section 176, Criminal Procedure Code, Cap. 75.
[8] *Ibid*
[9] *Supra*(n2)
[10] Section 204, Criminal Procedure Code, Cap. 75.
[11] Kiage, P., & Kanjama, C. (2010). *Essentials of Criminal Procedure in Kenya*. African Books Collective.

Moreover, the Office of the Director of Public Prosecutions (ODPP) Act in section 205[12] allows the ODPP to withdrawal criminal proceedings as follows;

> *"(1) The Director may, with the permission of the court, discontinue a prosecution commenced by the Director, any person or authority at any stage before delivery of judgement.*
>
> *(2) Pending the permission by the court in accordance with subsection (1), the Director may apply orally or in writing to the court for a stay of proceedings with a view that such proceedings may be taken over by the Director to prevent and avoid abuse of the legal process and to protect the public interest.*
>
> *(3) Nothing in this section prevents the Director from continuing to conduct proceedings in the name of the person or authority that instituted those proceedings."*

This provision is pursuant to Article 157[13] of the Constitution and was the basis of *R v Mohamed Abdow Mohamed (2013) e KLR*[14] where the families applied for the withdrawal of a murder case, through the ODPP, on grounds that the family of the deceased and the accused had reconciled under Islamic customary law and that compensation was paid in blood money in accordance to Islamic customs. The Honourable justice R. Lagat-Korir acquitted the accused stating the following;

> *"Under Article 157 of the Constitution the Director of Public Prosecution is mandated to exercise state powers of prosecution and in that exercise may discontinue at any stage criminal proceedings against any person. In the unique circumstances of the present*

[12] Section 25, ODPP Act
[13] Article 157, Constitution of Kenya, 2010
[14] Criminal Case No. 86 of 2011, High Court at Nairobi.

application, I am satisfied that the ends of justice will be met by allowing rather than disallowing the application. Consequently, I discharge the accused."

This case is considered a landmark case in the application of ADR mechanisms in criminal matters in Kenya and implies that ADR mechanisms can be applied even in cases of capital offences.[15]This decision shows that ADR mechanisms are applicable and effective in settling criminal matters as long as they pass the non-repugnancy rule set out by the Constitution which is the supreme law of the land. [16]

3.3 Boundaries of the Application of ADR in the Criminal Justice System

From the foregoing legal provisions on the application of ADR mechanisms, it appears that their applicability is hinged on the following factors: the type of criminal offence, the parties that are involved and the timing of the resolution. These factors are discussed thoroughly below.

3.3.1 The Type of Criminal Offence

The CPC in Section 176[17] provides for the application of ADR mechanisms such as reconciliation during criminal proceedings but only for misdemeanours and not felonies or capital offences. After the approval of the compensation or any other reconciliation agreement, the Court can terminate or stay the criminal proceedings.[18] The letter and spirit of this section of the CPC implies that ADR mechanisms can only be applied to misdemeanours but not felonies. Misdemeanours can be defined as minor crimes that attract jail terms of less than one year while felonies are serious crimes

[15] *Supra*(n11)
[16] Kariuki, F. K. (2015). Customary law jurisprudence from Kenyan courts: implications for traditional justice systems.
[17] *Supra*(n7)
[18] *Ibid*

that attract jail terms of more than one year and include crimes such as murder, arson, kidnap and rape.[19] This distinction was upheld in *Juma Faraji Serenge alias Juma Hamisi v Republic (2007) eKLR*[20] where the judicial officer rejected the application to withdraw the matter and have the case settled out of court stating the following;

> *"To the best of my knowledge, other than in cases of minor assault in which a court can promote reconciliation under section 176 of the Criminal Procedure Code and such minor cases a complainant is not allowed to withdraw a criminal case for whatsoever reason. In any case the real complainant in all criminal cases, and especially so felonies, is the state. The victims of such crimes are nominal complainants. And the state, as the complainant, cannot be allowed to withdraw any such case because the victim has forgiven the accused as happened in this case or any such other reason… To allow withdrawals of criminal cases like this is tantamount to saying that relatives of murdered persons can be allowed to withdraw murder charges against accused persons whom they have forgiven. That cannot be allowed in our judicial system."*

Correspondingly, this decision was upheld in *Republic v Abdulahi Noor Mohamed (alias Arab) (2016) eKLR*[21] where the accused who was charged with murder made an application for the case to be thrown out on grounds that they had reconciled with the family of the deceased. The judicial officer rejected the application by stating the following;

> *"The Constitution and the written laws recognize alternative dispute resolution and traditional dispute resolution mechanisms as means of enhancing justice. The court does appreciate the good will of the accused family and that of the deceased in their quest to*

[19] Lumumba, P. L. (2005). *A handbook on criminal procedure in Kenya*. African Books Collective.
[20] Juma Faraji Serenge alias Juma Hamisi v Republic (2007) eKLR.
[21] Republic v Abdulahi Noor Mohamed (alias Arab) (2016) eKLR.

have the matter settled out of court. The charge against the accused is a felony and as such reconciliation as a form of settling the proceedings is prohibited. Furthermore, this request is being made too late in the day, when the case has been heard to its conclusion. For these reasons I find that the application lacks merit. The application is therefore disallowed."

These decisions are contrary to that of *R v Mohamed Abdow Mohamed (2013) e KLR*[22] and that of *Republic v Musili Ivia & another [2017] eKLR* [23]where the judge allowed an application to terminate criminal proceedings against the accused, who were accused of murder on grounds that they had reconciled with the family of the deceased and paid compensation in the form of blood money according to the Akamba traditions. Additionally, this application was put forth before the criminal proceedings began and the DPP stated that they could not get witnesses as a result of the reconciliation.[24] The judge stated the following in his decision;

"Under Article 157(6) and (8) of the Constitution of Kenya 2010, the Director of Public Prosecutions has power to discontinue criminal proceedings subject to the permission of the court……..In my view, this court is entitled to promote the reconciliation as requested and I thus allow the request of the Director of Public Prosecutions and order that the criminal proceedings herein against the two accused herein for murder be and are hereby discontinued."

These decisions which are in disagreement with one another show that the boundaries of the application of ADR mechanisms to criminal matters has not been clearly defined thus leading to contradicting jurisprudence. This situation calls for further analysis of the spirit and the letter of

[22] *Supra*(n14)
[23] Republic v Musili Ivia & another [2017] eKLR
[24] *Ibid*

the Constitution which will guide the creation of policies and institutions that will promote and regulate the application of ADR mechanisms especially in criminal matters.

3.3.2 The Parties Involved

The Kenyan criminal justice system recognizes that the parties involved in a criminal case are the accused, the complainant and the prosecution.[25] The CPC in Section 204[26] allows for the complainant to withdraw a criminal case at any time during criminal proceedings before the final judgment is pronounced. This calls for the involvement of the appropriate parties during the application of ADR mechanisms in criminal matters. This is particularly important since the question of who a complaint is in a criminal matter arose in the case *R v Faith Wangoi*[27] where the accused wanted their case of running an unregistered private school dismissed since the matter had been solved out of court. However, the judge denied the application since the prosecution had not been involved in and consented to this agreement. This decision called for the definition of the term complainant as "a person who lodges a complaint either with the police or any other lawful authority."[28] Nevertheless, in criminal matters, the term complainant as defined in the CPC refers to both the aggrieved persons and the state through the prosecution as was held in *Ruhi v Republic.*[29] Therefore for ADR mechanisms to be applied in criminal matters, there has to be an agreement between the state through the prosecution, the accused and the complainant so that an application to withdraw the matter from the courts can be granted.

The state is considered as a complainant in criminal matters since it has an interest to protect the rights of all its citizens of which the complainant is one of them.[30] Moreover it is the State that

[25] *Supra*(n19)
[26] *Supra*(n10)
[27] Republic v Faith Wangoi, Criminal Misc. No. 1 of 2015, High Court at Kajiado.
[28] *Supra(n19)*
[29] Ruhi v Republic (1985) KLR 373.
[30] Lumumba, P. L., & Franceschi, L. G. (2014). *The Constitution of Kenya, 2010: An Introductory Commentary*. Strathmore University Press.

defines what it construes as crimes and therefore committing a crime has a detrimental effect on the state.[31] This opinion was upheld in *William Ruto & Anor v Attorney General*[32] where the court held inter alia that '…the state is the complaint in every criminal case…' It is therefore evident from the foregoing discussion that the state is also a complainant in criminal matters and must be involved in all attempts at applying ADR mechanisms in criminal matters. This is evident in *R v Mohamed Abdow Mohamed (2013) e KLR*[33] and Republic *v Musili Ivia & another [2017] eKLR*[34] where the applications to withdraw criminal proceedings were accepted as the requests were made by the ODPP which is the representative of the state. In contrast, the applications in *Juma Faraji Serenge alias Juma Hamisi v Republic (2007)*[35] and *Republic v Abdulahi Noor Mohamed (alias Arab) (2016) eKLR*[36] were denied ostensibly since they were not made through the ODPP.

3.3.3 The Timing of the Resolution

The other matter of contention in the application of ADR mechanisms in criminal proceedings is the timing of the decision to settle the matter through ADR mechanisms.[37] The question is, when can ADR mechanisms be applied? Is it before a judgment by the court or after it? During criminal proceedings, a judgment is read after both the accused and the complainant have been heard by the court. The judgment determines the guilt or the innocence of the accused and is final and binding unless there is an appeal.[38] As the law currently stands, ADR mechanisms cannot be applied in criminal proceedings after a judgement has been entered, as was held in *Stephen Kipruto*

[31] *Ibid*
[32] William S.K. Ruto & Another v The Attorney General (2010) eKLR.
[33] *Supra*(n14)
[34]*Supra*(n23)
[35]*Supra*(n20)
[36] *Supra*(n21)
[37] *Supra*(n11)
[38]*Ibid*

Cheboi & 2 others v R.[39] the accused had been charged with assault, the matter proceeded, was concluded and a judgment was issued. Afterwards the accused told the court that they had reconciled with the complainant through TDRMs and that they wanted the judgement of the court set aside.[40] The judge held that the judgement could not be set aside since;

> *"…….whereas a complainant and the person who had committed an offence against him can reconcile even after there had been a conviction, such a reconciliation cannot, of itself, have any effect on the conviction. The conviction would stand even though there had been a reconciliation."*

Similarly, the court held in *Republic v Abdulahi Noor Mohamed (alias Arab) (2016) eKLR*[41]that in addition to the application to settle out of court being on a matter relating to a felony, it was also made after a judgement had been issued and therefore an out of court settlement could not be allowed. These two sets of precedence show that ADR mechanisms can only applied in criminal matters before a final judgement is given by the court and not afterwards even if reconciliation occurs.

3.4 Conclusion

This chapter has presented the circumstances under which ADR mechanisms can be applied in the CJS in Kenya. Further the chapter has discussed how the nature of the criminal offence in question, the parties involved and the timing of the application of ADR mechanisms affects their utilization in the CJS.

[39]Stephen Kipruto Cheboi & 2 others v R (2014) eKLR.
[40] *Ibid*
[41] *Supra*(n21)

CHAPTER FOUR

APPLICATION OF ADR IN THE CRIMINAL JUSTICE SYSTEM IN OTHER JURISDICTIONS

4.1 Introduction

This chapter presents examples of the boundaries of application of ADR mechanisms within the criminal justice systems of other countries with a special focus on Australia and Rwanda and how they compare to Kenya. Further, this chapter will look at the various forms of ADR mechanisms that have been applied in criminal justice systems throughout the world. This study chose to focus on Australia and Rwanda because these countries have successfully applied ADR mechanisms to criminal cases. It will answer the question 'How effective are ADR mechanisms in the criminal justice system'

4.2 The Application of ADR in the Criminal Justice System in Australia

The legal and criminal justice system in Australia is very similar to Kenya's seeing as it is both highly litigious and adversarial.[1] Australia has experienced the drawbacks of such an adversarial system in the criminal justice through increased incarceration rates for the youth and juvenile offenders and increased criminality among indigenous offenders.[2] In a bid to remedy this, Australia introduced family group conferencing[3] as an alternative way of resolving criminal matters that relate to children, the youth and indigenous populations. The Australian family group

[1] Lewis, M., & McCrimmon, L. (2005, September). The role of adr processes in the criminal justice system: A view from Australia. In Association of Law Reform Agencies of Eastern and Southern Africa (ALRAESA) Conference, Imperial Resort Beach Hotel, Entebbe, Uganda (pp. 4-8).
[2] Condliffe, P. (2004). Difference Everywhere…. *ADR Bulletin*, *6*(10), 2.
[3] Hayes, H. (2005). Assessing reoffending in restorative justice conferences. *Australian & New Zealand Journal of Criminology*, *38*(1), 77-101.

conferencing method is based on New Zealand's method which was introduced through the passing of the Children, Young Persons and Their Families Act.[4]

Family group conferencing is practised in all the states and territories in Australia but there are variations in the types of crimes covered, the size of the system and how it is organized.[5] For instance, family group conferencing is only done for small felonies and misdemeanours while in other it can be applied in more serious felonies such as sexual assault.[6] Family group conferencing has been made a part of the hierarchical response to juvenile crime through ensuring that all crimes committed by juvenile offenders go through the conferencing system before they get into the traditional criminal justice system.[7] The conferencing system brings together the offender, their families and the victim's families to discuss the crime, the harm it has caused and how the offender can compensate the victim's family. These discussions are moderated by a state appointed conference coordinator whose role is to pint out the heinousness of the criminal act without shaming the offender.[8]

The impetus of the family group conferencing system in Australia is to reintegrate the offenders into their communities while showing them the consequences of their actions. The aim of this approach is to protect the young offenders from being shamed and criminalised by the criminal justice without being offered any reintegration or reconciliation opportunities.[9] Conferencing

[4]Children, Young Persons and Their Families Act 1989 (NZ)
[5] Condliffe, P. (1998). Conferencing, challenging the parameters of the criminal justice system. *Proctor, The*, *18*(7), 10.
[6] *Ibid*
[7] *ibid*
[8] Currie, S., & Kift, S. (1999). Add Victims and Stir-Or Change the Recipe-Achieving Justice for Victims of Crime in Queensland. *James Cook UL Rev.*, *6*, 78.
[9] *Supra*(n5)

includes the families of the offender and those of their victims in an effort to show the offender the real effects of their crimes and to also show that their families still care about them despite their criminal activities. Australian experiences have shown that this approach creates feelings of remorse among offenders and often induces chance and behavioural reformation.[10]

The family group conferencing system has been taken up successfully in Australia but there have been criticism of the appropriateness of its application to criminal offenses since they are specific and complex and their nature makes them unamenable to reconciliation.[11] Some commentators state that there is no evidence that reconciliation has any long lasting influence outside the conferencing system.[12] Additionally, there have been concerns as to whether criminal offenses can be construed as disputes[13] and if there is really a way of reconciliation after an irreversible criminal offense has occurred. Conferencing also faces the challenge of balancing the rights of both the victim and the offender and questions of whether it is even possible to balance these rights with the application of ADR mechanisms.[14]

4.3 The Application of ADR in the Criminal Justice System in Rwanda

In Rwanda, there is a state recognized ADR mechanism which is anchored in TDRMs known as the Abunzi[15]. Their aim is to decongest the traditional justice system and improve access to justice for the citizens of Rwanda. The term Abunzi directly translates to "those who reconcile"[16] and

[10] *Ibid*
[11] Condliffe, P. (1998). The challenge of conferencing: Moving the goal posts for offenders, victims and litigants. *Australian Dispute Resolution Journal*, *9*(20), 139-149.
[12] *Ibid*
[13] *Ibid*
[14] *Ibid*
[15]Mutisi, M. (2011). The Abunzi Mediation in Rwanda: Opportunities for Engaging with Traditional Institutions of Conflict Resolution.
[16] *Ibid*

refers to about 35,000 mediators who are selected by the state to mediate over both criminal and civil disputes at the lowest Rwandan administrative level.[17] These mediators are selected on their basis of their understanding of TDRMs and their integrity and the system is legally recognized by the Organic Law[18] in Rwanda. Within the Rwandese justice system, it is obligatory for local criminal and civil disputes whose value is below 3 million Rwandese Francs[19] to go through the Abunzi mediators before getting to the court system.

The Abunzi system receives a lot of support of the Rwandan government as part of its resolve to bring justice to the people most of whom cannot afford to participate in litigation. The Abunzi system is based on the premise of restorative justice and the mediators are in fact barred from issuing punitive verdicts.[20] Their role is to promote reconciliation and cohesiveness through involving the whole community in conflict resolution while promoting unity and consensus building. To counter the issues of repugnancy, the Abunzi system is required to have a constitution that is at least 30% female[21] thus making it an inclusive legal system.

Despite its many successes, the Abunzi system has several challenges with the major one being heavy state influence[22] which dilutes the independence of the institution. Additionally, there have been complaints that the system is vulnerable to political manipulation[23] which might lead to retribution instead of promoting restoration. There have also been concerns that TDRMs are not

[17] *Ibid*
[18]The Organic Law on the Organisation, Jurisdiction, Competence and Functioning of the Mediation Committee was enacted on 14 August 2006 (Organic Law No 31/2006).
[19] *Ibid*
[20] *Supra*(n15)
[21] Supra(n15)
[22] Doughty, K. C. (2014). "Our Goal Is Not to Punish but to Reconcile": Mediation in Postgenocide Rwanda. *American Anthropologist*, *116*(4), 780-794.
[23] *Ibid*

as restorative as they have been often portrayed. TDRMs are also limited by the fact that they are only applicable to small community disputes and are often ill equipped to handle felonies and other serious crimes[24].

4.4 Special Forms of ADR Mechanisms in the Criminal Justice System

This section discusses Victim Offender Mediation, Family Group Conferencing, Restorative conferencing and Restorative circles.

4.4.1 Victim Offender Mediation

Victim offender mediation (VOM) started in Canada[25] in the early 70s as a restorative justice method that put the needs of the victim first. The aim of victim offender mediation is to provide a platform where the victim can converse with the offender and come to reconciliation and healing.[26] This approach is necessitated by the fact traditional litigation in criminal matters is taken over by the state thus leaving out the real victims dissatisfied and feeling uninvolved.[27] At its inception, VOM dealt with misdemeanours, petty crimes and juvenile offenders at the request of the victim. However, the ambit of VOM has increased in the recent past to include more serious felonies such as sexual assault, robbery with violence and vehicular manslaughter perhaps due to increased acceptance of restorative justice mechanisms.[28]

The benefits of VOM include reduced recidivism and increased chances of behavioural change for the offenders and the increased ability to process the trauma and heal from it for the victims.[29] This

[24] *Ibid*
[25] Wellikoff, I. (2004). Victim-Offender Mediation and Violent Crimes: On the Way to Justice. *CARDOZO ONLINE J. CONFLICT RESOL*, *5*, 2.
[26] Wright, M. (1996). *Justice for victims and offenders: a restorative response to crime*. Waterside press.
[27] *Ibid*
[28]Umbreit, M. S., Coates, R. B., & Vos, B. (2004). Victim-offender mediation: Three decades of practice and research. *Conflict Resolution Quarterly*, *22*(1-2), 279-303.
[29] *Ibid*

is especially important since imprisonment has been shown to increase the chances of hardened criminality as opposed to promoting the rehabilitation of offenders.[30] The shortcomings of this method of dispute resolution is that most mediators are not professionally trained, that the boundaries of the application of VOM have not been clearly defined and that there are chance of re-victimisation of the victims by the offender after release.[31]

4.4.2 Family Group Conferencing

Family Group Conferencing (FGC) is an ADR mechanism that involves the offenders, the victims, their families, social workers, probation officers and other community members.[32] This method began in New Zealand as a way of curbing the high incarceration rates of the youth from indigenous communities[33]. The aim of these conferences is to demonstrate the gravity and the consequences of the crime to the offenders and make plans for how compensation or reparations should be done.[34] The ability to communicate with the victim and listen to the effect that the crime had on them enables the offenders to show remorse.[35] Moreover, the participation of the entire community ensures the restatement of the gravity of the crime while showing the offender that there are people who care about their reformation and that they are willing to walk the journey with them.[36]

FGC process involves the preparation stage, the negotiation stage and the monitoring stage.[37] After the necessary preparations have been made, the conference is held with the victim and the offender

[30]Ashworth, A. (1993, June). Some doubts about restorative justice. In *Criminal Law Forum* (Vol. 4, No. 2, pp. 277-299). Kluwer Academic Publishers.
[31] *Ibid*
[32] *Supra(*3)
[33] *Supra*(4)
[34] *Supra*(5)
[35] *Ibid*
[36]*Ibid*
[37]Mensah-Panford, P. (2018). Mediation in Ghana's Criminal Legal System: A Proposal for an Extension to Cover Severe Offences.

being given a chance to speak. Afterwards, the offender and their family offer the victim compensation and if it is accepted the mediator draws up a plan for how the compensation will be carried out. In the end, the mediator monitors the offender and offers them any help that they may need to continue living a crime free life.[38] FGC have been seen to engender behaviour change especially among young offenders, increase the satisfaction of victims and promote reconciliation and restitution.[39]

4.4.3 Healing Circles

Healing circles is an ADR mechanism that was first practised by indigenous communities in Canada and Australia.[40] The aim of these circles is promote offender rehabilitation, the healing of the victims, reconciliation of victims and offenders and increased cohesion in the community.[41] Healing circles can be invoked by the offender before they are sentenced to foster reconciliation or after they are released from prison to facilitate reintegration into the community.[42]

Healing circles are headed by community leaders and typically involve the victim, the offender, their families, community members and social workers. Participants sit in a circle and pass a talking stick so as to ensure that every participant's opinion is heard. The victims get a chance to talk about the impact that the crime has had on them while the offender talks about their reasons for committing the crime and expresses their remorse to the victim and the community.

[38] *Ibid*
[39] *Ibid*
[40] *Ibid*
[41] Fiadjoe, A. (2013). *Alternative Dispute Resolution: A Developing World Perspective*. Routledge-Cavendish.
[42] *Ibid*

The overarching aim of the healing circles is to promote reconciliation, healing, truth and reintegration into the community for the offenders.[43] The healing circles are sometimes involved in the sentencing of offenders[44] with the input of the entire community. This ADR mechanism has been useful in promoting the rehabilitation of indigenous offenders and promoting the satisfaction and healing of victims and the entire community.[45]

4.5 Conclusion

From this chapter we have learnt how ADR mechanisms are applied within the CJS in Australia and in Rwanda and further expounded on special forms of ADR such as Victim Offender Mediation, Healing Circles and Family Group Conferencing. We have further learnt that the categorization on the application of ADR mechanisms in the CJS in Kenya that have been discussed in the previous chapter do not fully apply in the jurisdictions discussed herein. For instance, family group conferencing in Australia is taken as a first step in responding to juvenile offenders before they get into the criminal justice system. In Kenya however, going to court is usually the first step (more often than not) after which parties turn to ADR mechanisms. However, different states in Australia apply the Family Group Conferencing depending on the type of crime. Other states allow Family Group Conferencing for misdemeanours and not for felonies and vice versa. Finally, the most important lesson that has culminated in this chapter is that going to court should be the last step after parties have explored ADR mechanisms which did not bear any fruit.

[43] *Ibid*
[44] *Ibid*
[45] *Ibid*

CHAPTER FIVE

CONCLUSIONS AND RECOMMENDATIONS

5.1 Introduction

This chapter presents the conclusions of the study and the legal, institutional and policy recommendations for the applicability of ADR in criminal matters. It will answer the question 'What are the legal, institutional and policy frameworks that would enable the incorporation of ADR mechanism in the criminal justice system?'

5.2 Conclusions

The Constitution of Kenya allows for the application of ADR mechanisms during judicial proceedings in Article 159[1]. This application is limited by clause 3[2] of the same article which states that the ADR mechanisms must not be repugnant to justice or be in contravention of any written rule or the Constitution. The spirit of the Constitution during the creation of this provision was to increase access to justice and reduce the backlog of cases that is being experienced by the courts in Kenya.[3] Moreover this provision is a reiteration of the social contract that states that states that judicial power in Kenya belongs to its citizens and ADR mechanisms such as TDRMs allow them to exercise this power over judicial power in their country.[4]

However, Article 159[5] does not explicitly state the boundaries of the application of ADR mechanisms and thus does not exclude their application in the criminal justice system; Article 159

[1] Article 159(2), Constitution of Kenya 2010.
[2] Muigua, K., & Kariuki, F. (2014, July). ADR, Access to Justice and Development in Kenya. In Strathmore Annual Law Conference 2014 (Vol. 3).
[3] Muigua, K. (2015) Legitimising Alternative Dispute Resolution in Kenya: Towards a Policy and Legal Framework.
[4] *Ibid*
[5] *Supra*(n1)

thus forms the Constitutional basis for the application of ADR mechanisms in the criminal justice system. Further, section 176 of the CPC[6] allows for the conciliation of parties but limits it to misdemeanours and not felonies. Seeing as conciliation is an ADR mechanism then it further supports the application of ADR mechanisms to criminal proceedings but with limits. This understanding of the law was upheld in *Republic v Abdulahi Noor Mohamed*[7] and in *Republic v Juma Faraji Serenge* [8]where applications for out of court settlements on grounds of reconciliation were denied on grounds of the fact that the crimes in question were felonies.

However, there have been cases where ADR mechanisms have been applied in serious felonies such as murder in the Kenyan CJS. These include *R v Mohamed Abdow Mohamed (2013) e KLR*[9] and *Republic v Musili Ivia & another [2017] eKLR*[10] where the cases were terminated through the applications via the DPPs office stating that the parties had reconciled and that compensation had been paid under customary laws. This presents a need for establishing the parameters of the application of ADR mechanism in criminal proceedings.

Further, the study found that the boundaries of the application of ADR mechanism is determined by the type of crime, the parties involved and the timing of the application. As discussed before, there are cases where applications to settle criminal matters out of court have been rejected due to the crimes being felonies and others where the applications have been allowed even when the crimes were capital offences. Furthermore, it was established that all applications to apply ADR

[6] Section 176, Criminal Procedure Code, Cap. 75.
[7] Republic v Abdulahi Noor Mohamed (alias Arab) [2016] eKLR.
[8] Juma Faraji Serenge alias Juma Hamisi v Republic [2007] eKLR
[9] Criminal Case No. 86 of 2011, High Court at Nairobi
[10] Republic v Musili Ivia & another [2017] eKLR

mechanisms in criminal proceedings must involve the state through the prosecution since the state is also a complainant. Moreover, applications to apply ADR mechanism in criminal proceedings can only be done before a final judgement has been issued, otherwise the application will not be successful since its acceptance would be tantamount to usurping the powers of the courts.

ADR mechanisms have been applied in criminal proceedings in other jurisdictions such as Australia and Rwanda. Australia uses the Family Group Conferencing method on criminal matters involving minors and indigenous offenders. Reports indicate that this method has been instrumental in reducing recidivism and increasing behavioural change. On other hand, Rwanda has state appointed Abunzi mediators who use TDRMs to solve criminal and civil matters whose value is below 3 Million Rwandese Francs. This system is well regulated by the state and has improved access to justice while increasing community participation in their legal affairs. The study also established that there are other ADR mechanisms that have been applied in the criminal justice system such as Victim Offender Mediation, Family Group Conferencing and Healing Circles.

5.3 Recommendations

5.3.1 Policy Recommendations

The National Council on the Administration of Justice is a high-level policy making, implementation and oversight coordinating mechanism established under section 34 of the Judicial Service Act. It is composed of state and non-state actors in the justice sector whose mandate is to ensure a coordinated, efficient, effective and consultative approach in the administration of justice

and reform of the justice system.[11] It is against this backdrop that I make the following recommendations:

Short Term

That the NCAJ issues directions on the boundaries of application of ADR to criminal matters, specifically on where it can or cannot be applied. This will help in achieving the spirit of the inclusion of ADR mechanisms in the Constitution which is to improve access to justice.

That the National Council on the Administration of Justice comes up with policy guidelines that delineates the types of criminal matters where ADR mechanisms can be applied and direct such cases there directly with the supervision of the traditional justice system.

Medium Term

The National Council on the Administration of Justice confers with various community leaders, especially in marginalized areas so as to make TDRMs non repugnant to justice which will improve their acceptability and application.

Long Term

That the judiciary applies the special ADR mechanisms such as Family Group Conferencing, Victim Offender Mediation and Healing Circles in the juvenile courts so as to ease the backlog and reduce recidivism. This will go a long way in offering restorative justice to the people who need it the most.

5.3.2 Institutional Recommendations

The study recommends the following:

[11] Section 35 of the Judicial Service Act

That both the National Council on the Administration of Justice and the Mediation Accreditation Committee of the Judiciary's pilot programme on Court Annexed Mediation should come up with guidelines that promote the uptake of ADR mechanisms in the Kenyan criminal justice system.

That institutions that specifically deal with the application of ADR mechanisms in the CJS are created so as to streamline the process. To promote independence, integrity and tenure of these institutions, it would be important to have them enshrined in the Constitution which can only now be done through a referendum.

5.4 Summary

This study achieved its objectives by determining that ADR is mostly effective in the CJS when applied for misdemeanours for instance in cases of assault and creating disturbance where the law through section 176 and 204 of the Criminal Procedure Code allow for reconciliation and hence withdrawal of such cases. On the other hand, however, withdrawal or discontinuance of capital offences is not as straightforward as that of misdemeanours. The DPP ought to make the application for withdrawal/nolle prosequi after being satisfied that in deed the parties have reconciled and further that the application ought to be made before judgment has been entered. Finally, the study provided recommendations for both policy and institutional frameworks that would allow for the application of ADR in the CJS. The research questions were answered through a thorough review of existing literature on the subject of the application of ADR in the CJS. The study therefore accepts the hypothesis that ADR is applicable in the CJS under some special parameters but not in all instances. The researcher proposes further research with regard to plea bargaining in jurisdictions where the same has taken off without hitches that we are experiencing in our jurisdiction.

REFERENCES

A. Legal Instruments

Arbitration Act No. 4 of 1995(As amended in 2009) of the Laws of Kenya.

Civil Procedure Act, Chapter 21 of the Laws of Kenya.

Employment Act No. 11 of 2007 of the Laws of Kenya.

Environment and Land Court Act No. 19 of 2011 of the Laws of Kenya.

Judicature Act, Chapter 8 of the Laws of Kenya.

Judicial Service Act No. 1 of 2011

Labour Institutions Act No. 12 of 2007 of the Laws of Kenya.

Labour Relations Act No. 14 of 2007 of the Laws of Kenya.

Magistrates' Courts Act, Chapter 10 of the Laws of Kenya.

Office of the Director of Public Prosecutions Act No. 2 of 2013 of the Laws of Kenya.

The Constitution of Kenya, 2010.

The Criminal Procedure (Plea Bargaining) Rules 2018, Chapter 75 of the Laws of Kenya.

The Criminal Procedure Code, Chapter 75 of the Laws of Kenya.

The Penal Code, Chapter 63 of the Laws of Kenya.

B. Textbooks

Bentham, J. (1996). *The collected works of Jeremy Bentham: An introduction to the principles of morals and legislation*. Clarendon Press.

Cross, R., & Harris, J. W. (1991). *Precedent in English law*. Clarendon Press.

Freeman M.D.A. (2008). *Lloyds Introduction to Jurisprudence*. Sweet and Maxwell

Ghai, Y. P., & McAuslan, P. (1970). Public law and political change in Kenya: A study of the legal framework of government from colonial times to the present. Oxford University Press.

Muigua, K. (2017). *Settling disputes through arbitration in Kenya*. Glenwood publishers limited.

Uwazie, E. (Ed.). (2014). *Alternative dispute resolution and peace-building in Africa*. Cambridge Scholars Publishing.

C. Articles and Journals

Alamin, M. (2015). "Introducing Alternative Dispute Resolution in Criminal Litigation: An Overview". *Journal of Research in Humanities and Social Science, 3*(11), 68.

Alfini, J. (1986). 'ADR and the courts: An Introduction', Judicature 252.

ALTERNATIVE_DISPUTE_RESOLUTION_IN_NIGERIA_CRIMINAL_JUSTICE accessed on 17/9/2019.

Chowdhury M.A.A (2018), An Overview of the Practice and Prospect of Alternative Dispute Resolution in Criminal Justice System in Bangladesh: Promotion of Access to Justice. *Int. J. Adv. Res. 6(11), 712-721.*

Elechi, O. O. (2004, August). Human rights and the African indigenous justice system. In *Paper for presentation at the 18th International Conference of the International Society for the Reform of Criminal Law* (pp. 8-12).

Kariuki F. (2014), Applicability of Traditional Dispute Resolution Mechanisms in Criminal Cases in Kenya: Case Study of Republic v Mohammed Abdow (2013) eKLR *(2014) 1 Alternative Dispute Resolution Journal.*

Kariuki, F. (2014). Applicability of Traditional Dispute Resolution Mechanisms in Criminal Cases in Kenya: Case Study of Republic v Mohamed Abdow Mohamed'. *Alt. Dis. Res. J., 2*, 202-202.

Lewis, M., & McCrimmon, L. (2005, September). The role of adr processes in the criminal justice system: A view from Australia. In *Association of Law Reform Agencies of Eastern and*

Southern Africa (ALRAESA) Conference, Imperial Resort Beach Hotel, Entebbe, Uganda (pp. 4-8).

Michel, J. (2011). Alternative dispute resolution and the rule of law in international development Cooperation. *J. Disp. Resol.*, 21.

Muigua, K. (2014). ADR: The Road to Justice in Kenya. *Chartered Institute of Arbitrators (Kenya Branch), 2*(2014).

Muigua, K. (2015) Legitimising Alternative Dispute Resolution in Kenya: Towards a Policy and Legal Framework.

Muigua, K. (2015, July). Empowering the Kenyan People through Alternative Dispute Resolution Mechanisms. In *CIArb Africa Region Centenary Conference 2015*.

Muigua, K., & Kariuki, F. (2014, July). ADR, Access to Justice and Development in Kenya. In *Strathmore Annual Law Conference 2014 held on* (Vol. 3).

Nwosu K (2010), Criminal Justice Reforms in Nigeria: The Imperative of Fast Track Trials, Plea Bargains, Non-Custodial Options and Restorative Justice accessed at www.nigerialawguru.com/aricles/criminal%20law%20and%20procedure/CRIMINAL%20JUSTICE%20REFORMS%20IN%20NIGERIA.pdf on 17/9/2019.

Obiere F. (2017), ADR and the Nigerian Criminal Justice System a Necessary Union for the Attainment of True Justice at https://www.academia.edu/Documents/in/ THE_ROLE_

Palmer, R. (1997). Justice in Whose Interests-A Proposal for Institutionalized Mediation in the Criminal Justice System. *S. Afr. J. Crim. Just.*, *10*, 33.

Paul M. Gachoka, S. Memba, 'An appraisal on the jurisprudential and precedential leaps institutionalizing the ideals of ADR in the Kenyan Criminal Justice System' (2019) 7 (1) Alternative Dispute Resolution Journal.

Spader, D. J. (1988). Criminal justice and distributive justice: Has the wall of separation been reduced to rubble? *Justice Quarterly, 5*(4), 589-614.

Tobiko, K. (2013, September). The relationship between formal rule of law and local traditional justice mechanism. In *A paper presented at the 18th IAP Annual Conference and General Meeting, Moscow, Russia, 8th-12th September*.

Van Ness, D. W., & Strong, K. H. (2014). *Restoring justice: An introduction to restorative justice*. Routledge.

Xie Z (2011, October). 'The Facilitative, Evaluative and Determinative Processes in ADR,' availableathttp://www.xwqlaw.com/info/c47f5ff15b464882ad5c9a7f97338652, (accessed on 7/03/2018).

D. Case Law

Republic v. Mohamed Abdow Mohamed (2013) eKLR

Juma Faraji Serenge alias Juma Hamisi v Republic (2007) eKLR.

Republic v Faith Wangoi (2015) eKLR

Ruhi v. Republic (1985) KLR 373.

William S.K Ruto & Another v The Attorney General (2010) eKLR

Stephen Kipruto Cheboi & 2 others v R (2014) eKLR.

Republic v Abdulahi Noor Mohamed (alias Arab) (2016) eKLR

Republic v Musili Ivia & another (2017) eKLR.

Republic v Leraas Lenchura (2012) eKLR