

The collaboration of investigative authorities in Kenya

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APPRECIATION

I would like to thank the organizers of this conference for allowing me present my thoughts on the “Collaboration of Investigative Authorities in Kenya”. This will shed some light on some of the problems facing criminal proceedings in Kenya. I am sure that the outcome of this conference will help improve on the collaboration efforts in investigations which will help in effective administration of justice.

OUTLINE

The following will be my talking points which I will discuss briefly:

- The Structure of Investigative Authorities
- The Mode of Operations in Investigations
- The Collaboration of Investigative Authorities
- Challenges hampering collaboration efforts
- The Prosecution Link
- Examples of Poor Collaboration in Investigations
- Emerging Collaboration Strategies
- Way forward

A. Introduction

Justice is the process that entails the “*upholding of rights and punishment of wrongs by law*.”¹ Administration of justice has been defined as “*the personnel, activity and structure of the justice system; courts and police in the detection, investigation, apprehension, interviewing and trial of persons suspected of crime*”² From the definition of justice and administration of justice it is clear that the investigation process is a major step or chain in the justice system. If proper investigations are carried out properly then justice can be administered effectively. In this case rights are upheld and the wrongs are punished. Collaboration

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1 *Ovunda Okene*, Effective Administration of Justice in Nigeria, River State University of Science and Technology, Port Harcourt 1998 quoting Osborne’s Concise Law Dictionary, https://works.bepress.com/ovunda_v_c_okene/36 (accessed August 18, 2016) 191.

2 www.duhaime.org/LegalDictionary/AdministrationofJustice.aspx (accessed August 16, 2016).

of investigative authorities can be said to exist when authorities cooperate or work together in the interest of preventing crime and punishing crime.

B. Structure of the Investigative Authorities

The main investigative authority in Kenya is the National Police Service (NPS). The National Police Service is established by the constitution³ and is composed of the Administration Police Service and the Kenya Police Service. The Inspector General has the command of the National Police Service. In section 24 of the National Police Service Act⁴ one of the functions of the Kenya Police Service is to carry out investigations of crimes.⁵ By dint of section 35 of the National Police Service Act confers the investigation function to the directorate of criminal investigations.

The functions of the directorate include investigation of crimes such as homicide; narcotic crimes, human trafficking, money laundering, terrorism, economic crimes, piracy, organized crime, and cyber crime among other crimes. The departments have various units that deal with specific categories of criminal conduct such as land fraud; economic crimes; banking fraud, capital markets related crimes; serious crimes unit,⁶ revenue protection services, insurance fraud, finance investigations, anti-terrorism and the anti-narcotics.⁷ The directorate also coordinates international police (Interpol) country affairs.⁸

Such investigations can also be carried out upon directions given to the Inspector General by the Director of Public Prosecutions pursuant to article 157 (4) of the Constitution. Investigations can also be initiated through filing of complaints through the police stations. If a complaint is found worthy of investigations then the case is escalated to the relevant department.

The directorate of criminal investigations may also investigate any matters referred to by the Independent Police Oversight Authority (IPOA).⁹ IPOA is an authority mandated to initiate investigations against any allegations of criminal conduct by the police.

There are other investigative agencies (government entities) that have investigative powers, besides the National Police Service. Section 2 of the Office of the Director of Public Prosecutions Act has listed such investigative agencies as: the Ethics and Anti-Corruption Commission;¹⁰ Kenya National Commission of Human Rights; Commission of Administra-

3 Article 243, Constitution of Kenya.

4 National Police Service Act (Act No.11A of 2011).

5 Section 24, National Police Service Act No. 11A of 2011.

6 The serious crimes in question include homicide, kidnapping, robbery with violence, human trafficking, complicated fraud and theft, environmental crimes and cyber crimes. See note 7.

7 www.cid.go.ke, (accessed August 1, 2016).

8 Section 35 (i), National Police Service Act.

9 Section 35 (j) of the National Police Service Act.

10 The body is mainly involved with the investigation of corruption and economic related crimes. It is established under Ethics and Anti Corruption Act, 2013.

tion of Justice;¹¹ Kenya Revenue Authority;¹² Anti-Counterfeit Agency¹³ or any other Government entity mandated with criminal investigation roles conferred by law.

Other investigative agencies that work together with the National Police Service are the Kenya Copyright Board¹⁴; Kenya Wildlife Service¹⁵, Kenya Forest Service;¹⁶ National Environmental Management Authority;¹⁷ Labour Department;¹⁸ Pharmacies and Poisons Board¹⁹ and Immigration Department among other entities.

C. The Mode of Operations in Investigations

The Director of Public Prosecutions has powers pursuant to article 157(4) of the constitution to direct the Inspector general to conduct investigations on any allegation of criminal conduct.²⁰ Investigations can also be initiated when a citizen files a complaint with the police. If it is a complaint that warrants investigations it is forwarded to the relevant departments to start investigations.

The investigation agencies that work alongside the National Police Service specialize on specific crimes since they have the relevant expertise required for the investigation. With such crimes the agencies work with the police who assist in making arrests and providing custody for such suspects.

For example where goods suspected to be counterfeit have been seized by police officers or any other government officer, the anti counterfeit agency is called upon to ascertain whether the goods are counterfeit. If so the suspected criminals are apprehended and put in custody. The agency then takes up the matter. The agency has special prosecutors who help prosecute such crimes relating to counterfeit goods.

11 The operations of the Commission are guided by The Commission of Administration of Justice Act (Act number 23 of 2011).

12 The authority is guided by the Kenya Revenue Authority Act (Chapter 469) Laws of Kenya.

13 The body is involved in the investigation of offences related to dealings in counterfeit goods. The Anti-Counterfeit act No.13 of 2008 is the enabling Act.

14 The body helps in investigation of copyright related offences and it is established under The Kenya Copyright Act (CAP 130 laws of Kenya).

15 The body helps in investigation of wildlife related offences and it is established under the Wildlife Conservation and Management Act, 2013.

16 The body investigates forest related offences and is established under Forest conservation and Management act, 2015.

17 The body is established under the Environmental Management and Coordination Act (Act No.8 of 1999).

18 The department is established under section 35 1 (k), Labour Institutions Act (Act No.12 of 2008).

19 The body assists in the investigations of unlawful use of all drugs, chemical substances and medical devices. The enabling Act is Pharmacy and Poisons Act (Cap 244) Laws of Kenya.

20 In Section 5 of the Office of the DPP Act (Act No. 2 of 2013).

D. Collaboration of Investigative Authorities

Collaboration of investigative authorities is best seen in crimes that are trans-boundary or major crimes that are of high public interest.²¹ In cases involving cross border crimes, collaboration is expected between the Kenya police and the International police. Such cases include the narcotics related crimes, stealing of motor vehicles from other countries, poaching, money laundering related crimes and other related crimes. This year 2016, July one of the kingpins in ivory trade arrested in Tanzania with the help of Interpol was jailed and fined heavily.²² This was as a result of collaboration efforts between concerned agencies which include Kenya Wildlife Service, Kenya Police and International Police .

In corruption related cases where loss of large amounts of money is involved; different agencies collaborate in the investigations. The Ethics and Anti- Corruption Commission is the agency mandated to investigate corruption related crimes. Other institutions such as the Office of the DPP in the investigations. A team is normally formed to investigate the cases as it involves a lot of legal issues and trails that need to be established to ensure success of the case once the case is presented in court.²³

Most of these cases are borne out of scandals involving government officers and public figures. An example of such a case is the National Youth Service Scandal in 2016 that caused the resignation of the Cabinet Secretary under whose docket it was found. Over 800 million was recorded as lost through dubious contracts. In this case the DPP sanctioned a multiagency team that includes Ethics and Anti Corruption Commission, the Central Bank team, Prosecutions and the Kenya Revenue Authority. The Office of the DPP was also included in the team. The crimes fell under these agencies and many laws are to be used when prosecuting the crimes. The laws include the Penal Code, the Proceeds of Crime and Anti Money Laundering Act²⁴ and the Prevention of Organised Crime Act.²⁵ Various persons who were highly ranked in the government have been arraigned in court.²⁶

There is also the anglo-leasing scandal that was discovered in 2005 during Kibaki's government that caused a loss of over Kenya shillings 10 billion from the public account through corrupt awarding of dubious contracts. The case is still ongoing.

- 21 Such crimes could be corruption related where there is a loss of a lot of money from the public accounts.
- 22 *Willis Oketch and Joackim Bwana*, "Ivory Trafficking Kingpin Feisal Mohammed jailed 20 years, fined Ksh 20 million" July 23, 2016 < <http://www.standardmedia.co.ke/article/2000209543/ivory-trafficking-kingpin-feisal-mohammed-jailed-for-20-years-fined-sh20-million>> accessed on August 18, 2016.
- 23 This is from an interview with a key informant a Senior Prosecutor from the Office of the DPP, Nairobi on July 13, 2016.
- 24 Chapter 59B, Laws of Kenya.
- 25 Chapter 59, Laws of Kenya. *Brian Wasuna* "Court freezes 20 Bank Accounts in National Youth Service Scam (Kenya) ", the Business Daily October 13, 2015. <http://asokoinsight.com/news/court-freezes-20-bank-accounts-national-youth-service-scam-kenya>, (accessed on August 16, 2016).
- 26 The investigations are still ongoing.

E. Have the investigative authorities been successful in their Collaboration?

The investigation authorities can only be said to be successful if the cases they investigate result in apprehension and convictions of the perpetrators of the crime. There are many challenges that are faced by the investigative authorities which hinders their efforts to curb crime. This is reflected by their poor output when most cases in court are dismissed.

Many are the times the investigators are served with court orders stopping investigations whereas an issue in an application awaits to be solved. The application may remain unprosecuted for a long time hence causing a delay in completion of the investigations and the case itself. In the applications, most petitioners make claims that their rights are about to or have been infringed hence seek orders to stop the investigations.

The court orders are seen as a tactic to frustrate the prosecution of the cases. In 2015 the High court suspended proceedings in the lower courts of the case of *R v Deepak Kamani & Others*.²⁷ This is despite the fact that this case is of high public interest as it involved loss of large amounts of money from the public account. Such orders have consequences of suspending the investigations that could be ongoing. All institutions involved must await the outcome of the case.

At times the investigation efforts go into waste when the investigators are unable to procure attendance of witnesses in the cases²⁸ hence the cases are dismissed either for non attendance of witnesses which results in having insufficient evidence to enable the accused persons be put on their defence. The investigators bear the responsibility of ensuring that the witnesses in the case attend in court since they are seen to have the details of the witnesses.

Other investigators have been said to compromise their own cases. This is where investigators have caused their own cases to fail having been compromised by interested parties. This observation was also made in a study done in 2015 whose one of the findings was a major presence of corrupt investigators.²⁹ The banking sector revealed that there was weak collaboration between industries; that is the security officers in the banks and the officers from the national police service. The major complaint being that the police did not take

27 Sandra Chao "Reprieve for 10 as High Court suspends Anglo-leasing Case" July 20, 2015, the Business Daily < www.businessdailyafrica.com/High-Court-Suspends-Anglo-leasing-case=/539546-280009205rb72/index.html > (accessed on August 16, 2016).

28 Either due to threats issued to the witnesses. The investigators fail also when they fail to hand over witnesses under threat to the witness protection unit. This was an opinion relayed by about four prosecutors I interviewed in Nairobi. This was a problem that was also identified in the prosecution of banking fraud cases. See note 27.

29 Word Justice Project, Problems facing Criminal Investigations Systems <wordjusticeproject.org/problems-facing-criminal-investigation-systems> (accessed on August 15, 2016). These were findings made from questionnaires that were distributed to qualified respondents. They included opinions of over 2500 legal academics and practitioners.

time to collect their evidence and they always seemed to be in a hurry.³⁰ This hampers collaborations efforts in investigations.

The investigation efforts are also wasted when the police files are not availed to the prosecutors in court in good time. In Kenya the prosecutors rely on the police files to prosecute the cases. Sometimes the files are availed in court too late in the day therefore the prosecutors are not able to prosecute cases effectively.³¹ The prosecutors are then not able where necessary to give further directions on investigations.

Another challenge is when the investigations and arrests are done hastily. This result in many cases being dismissed for lacking sufficient evidence. This can be attributed to the presence of incompetence in some of the investigators and lack of professionalism.³²

Investigations are also hampered when uncoordinated transfers are done in the police force. The few experts in the investigation are sometimes taken to areas where there are not going to use their expertise.³³ This interferes with investigations and prosecution of cases in court. This challenge was also noted in the banking industry where it took too long for investigations to be completed on banking fraud cases.³⁴

All these challenges negatively affect the collaborations efforts whose purpose is to ensure effective administration of justice.

F. The Prosecution Link

The prosecution role is not only important in prosecution but also in investigations. Many are the times that investigations continue even when the case is in court. The prosecutor is in a position to advise on the need to get more evidence in order to sustain a case in court. The prosecutor's role is only advisory in nature. The Office of the Director of Public Prosecution Act introduced a new mode of appointing prosecutors. This was after deriving its power from the Constitution that set up an independent the office of the Director of Public Prosecutions. The institutions employed prosecuting counsels who had to be law graduates. Before the new set up, the prosecutors were police officers who had attained the rank of Inspector after which they trained in prosecution.

The police were given options to remain in prosecution but they had to undertake a law degree course. Most of them opted to go back to their police duties. This meant that the investigators (police) had to work and report to prosecution counsels who were non-police or 'civilians'. Hence the command of power established in the ranks of police was no lon-

30 *Sera Akelola*, Prosecuting Banking Fraud in Kenya: Challenges faced by the Banking Sector, *Journal of Finance and Management in Public Services* 14(1), www.cipfa.org/-/media/files/.../jfmps---march-2015---akelola.pdf?.. (accessed August 5, 2016).

31 These were opinions relayed by all the prosecutors I interviewed.

32 This was a challenge that was also pointed in the banking industry. *Sera Akelola* (note 28).

33 *Ibid*. A similar complaint was raised from the banking sector on frequent transfers hence the banks have to deal with different persons most of the times when there are crimes to be investigated.

34 *Sera Akelola*, note 28.

ger there. The investigators took time to adapt to the new change in prosecution. The prosecutors felt that the investigators no longer felt the urgency of ensuring that the cases are prosecuted without delays. Most complaints have been non availability of police files in court or the files are not availed in good time. Therefore they prosecutors barely get enough time to prepare for the cases in court.³⁵

This link has a bearing on the conduct of investigations. Some investigators are yet to adjust in the new working relationship with civilians who are prosecutors. Therefore there is a presence of weak investigations as there are no immediate sanctions for the investigators from the prosecutor as they are not in the police force.

This aspect of the prosecution link weakens the collaboration that is needed to ensure that perpetrators of crimes are prosecuted successfully in court.

G. Examples of Poor Collaboration in Investigations

There are various indicators for poor collaboration in investigations. This can be clearly identified from the court cases. Poor collaboration is evident where cases are dismissed for lack of sufficient evidence because of shoddy investigations. In the case of **Raphael Lokini v Republic**³⁶ the appellant was acquitted having being imprisoned for a sexual related offence. This was because there was no evidence regarding the age of the victim which is critical in sentencing of sexual related offences. Such a mistake can also be placed on the prosecution as they have a role to play in identifying and correcting such anomalies before they are acted upon by the court.

In the case of **Republic v Beatrice Wairimu**³⁷ the accused was charged with murder which attracts a death penalty. On hearing the case it was apparent that the wrong person had been brought to court hence the case was dismissed and the accused was set free.

H. Emerging Collaboration Strategies

There have been emerging collaboration strategies to counter and apprehend the real perpetrators of the upcoming major crimes. There has been the approach of forming multiagency teams to investigate the crimes. A multiagency team is made up of persons from different investigative agencies. It may also include prosecutors. In the cases involving the National Youth Service scandal a multiagency team is in conduct of the investigations.³⁸ Special teams are also formed to investigate wildlife related crimes so as to deal with the crimes that contribute towards extinction of various species. There is collaboration even with investigative authorities from other countries as the crimes are at times cross border crimes.

35 Several prosecutors I interviewed in Nairobi who wished not to be named relayed these opinions.

36 Criminal Appeal Number 74 of 2010, Nairobi, (eKLR).

37 High Court Criminal Case no. 28 of 2010, Nakuru, (eKLR).

38 *Brian Wasuna* (note 24).

I. Way forward

Despite the challenges hampering successful collaboration of investigative authorities, the prosecutors interviewed proposed some of the recommendations provided here that could improve collaboration and therefore help in the effective administration of justice. Informal meetings could be held by the prosecutors with the investigators through the officer in Charge of the respective police division (OCPD). This could provide a forum where issues affecting conduct of the case are discussed.

Mechanisms can also be set to ensure that the prosecutors have all the files for cases in court. This can give the prosecutor an edge in advising the investigators on what additional evidence can be sought to ensure successful prosecution of the case.

The Office of the DPP can also adopt the multiagency approach of investigating crimes that fall under various legislations and crimes that are of high public interest such as cases involving corruption. This can strengthen the effective administration of justice.

It was also recommended that forums be held together with the judiciary on investigation processes so as to sensitise the judiciary on the challenges related to investigations. This can help in reducing instances where cases are dismissed on technicalities yet crimes have been committed.

In dealing with challenges related to availability of police files and the prosecution process, digitization of the investigation process can help in enhancing effective collaboration which will in effect deliver successful delivery of justice.

I believe our discussions will make a positive contribution towards improving the collaboration efforts in the investigations. I welcome all to the ensuing discussion.

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