

**AN EXAMINATION ON THE RIGHT TO PEACEFUL ASSEMBLY AND THE DUTIES  
OF NATIONAL POLICE SERVICE: KENYA'S EXPERIENCE DURING 2017  
GENERAL ELECTIONS**

**SHANISH CHEPNEGICH**

**AD 101818**

**A DISSERTATION SUBMITTED TO THE RIARA LAW SCHOOL IN PARTIAL  
FULFILLMENT OF THE REQUIREMENTS FOR THE DEGREE OF BACHELOR OF  
LAWS (LLB) OF RIARA UNIVERSITY LAW SCHOOL**

**SEPTEMBER 2019**

## Table of Contents

DECLARATION .....	iii
ACKNOWLEDGEMENTS .....	iv
DEDICATION .....	v
LIST OF INSTRUMENTS .....	vii
TABLE OF INTERNATIONAL INSTRUMENTS .....	viii
TABLE OF ABBREVIATION .....	ix
CHAPTER ONE .....	1
INTRODUCTION .....	1
1. Introduction .....	1
1.1 Definition of Terms .....	2
1.2 Background .....	3
1.3 Statement of the Problem .....	4
1.4 Justification of the Study .....	5
1.5 Hypothesis .....	6
1.6 Limitations of the Study .....	6
1.7 Literature Review .....	6
1.8 Theoretical Framework .....	9
1.8.1 Utilitarianism Theory .....	9
1.8.2 Retributive Theory .....	10
1.9 Research Objectives .....	12
1.10 Research Questions .....	12
1.11 Research Methodology .....	13
1.12 Chapter Breakdown .....	13
CHAPTER TWO .....	15
2.1 Introduction .....	15
2.2 Content of the Right to Peaceful Assembly .....	15
2.3 Regulatory Framework of the Right to Peaceful Assembly .....	16
2.4 Jurisprudence from Courts on the Right to Peaceful Assembly .....	19
2.5 Human Rights Committee .....	22
2.6 African Commission on Human and Peoples' Rights .....	23
2.7 Conclusion .....	24

CHAPTER THREE .....	25
3.1 Introduction.....	25
3.2 Pre-Election Period .....	25
3.3 Election Period.....	26
3.4 Excessive Use of Force .....	28
3.5 The Geography of Violence .....	29
3.6 Challenges that Resulted from the Violation of the Right to Peaceful Assembly .....	30
3.7 Critical Analysis of the 2017 General Election.....	31
3.8 Conclusion .....	34
CHAPTER FOUR.....	35
4.1 Conclusions.....	35
4.2 Recommendations.....	36
4.2.1 Review of Legal Framework.....	36
4.2.2 Liability and Accountability of Police Officers .....	37
4.2.3 Use of Intelligence .....	38
4.3 Final Remarks .....	38
BIBLIOGRAPHY .....	40

**DECLARATION**

I, the undersigned, do declare that this dissertation, which I submit for the degree of Bachelor of Laws (LLB) in the Faculty of Law at Riara University, is my own original work and has not been previously submitted by myself or another person for any education award at another University. All sources of information relied upon have been correctly cited and acknowledged by myself.

Shanish Chepngetich

AD101818

Signed .....

Date .....

Supervisor's Approval

Dr Francis Khayundi

Signed .....

Date .....

## **ACKNOWLEDGEMENTS**

First and foremost, I thank Almighty God for the gift of life and well-being, and the strength to endure the rigors of researching and writing, which is not an easy adventure but through endurance, patience, focus and determination I'm indebted to this achievement.

Secondly, grateful appreciations go to my supervisor, Dr Francis Khayundi for taking me through my proposal with a lot of determination and passion, words of encouragement, instructions and enlightenment to ensure that my proposal met the required threshold.

Thirdly, I thank Ms Shako for taking me through my proposal and ensuring that I complied with all standards set.

Finally, I thank my parent who saw potential in me and decided to take me to law school and her moral support and unfailing encouragement that kept me moving.

I remain entirely liable for any mistakes through commission and omission in this work.

## **DEDICATION**

I would love to dedicate this research paper to the Almighty God for giving me good health, life and spiritual support to make sure that I not only finish writing this dissertation but also I accomplish my dream career.

To my mother Eunice Talai and my siblings for their support, efforts, love and encouragement throughout my life in law school.

To my supervisor, Dr.Francis Khayundi for his personal time and support to see through my writing of this dissertation. Sir, I really thank you for the support you gave me to complete my dissertation.

## ABSTRACT

In the previous general election that is 2017 in Kenya, there were allegations of political violence, high level of impunity by perpetrators and mistrust by the National Police Service. In this case, therefore, there have been several reports by the Kenya Human Rights Commission (KHRC) and also Non- governmental bodies that deals with human rights issues. Allegations were made that misuse of power and violation of this constitutional right was witnessed then and this was before and after the announcement of the presidential results.

Reports indicate that the police fired teargas, shot both the children and the old, and used live ammunition to disperse demonstrators among others during these peaceful assemblies.<sup>1</sup>Therefore, this research seeks to address the implementation of the right to peaceful assembly , the massive challenges in the implementation of this right and it also analyses whether the General Service Unit (GSU), which is a paramilitary group formed under National Police Service have misused their powers by killing, harming and dispersing peaceful assemblies. It also seeks to look at the deployment of the police during unrest in the country.

This research also addresses the procedure for obtaining the permit to peaceful assembly and Kenya's experience during 2017 general elections. The study further interrogates the rights of the people to peaceful assembly by looking at its limitations and the duties of the police as provided for in the 2010 Constitution, Statutes and International instruments. It will also aim to balance the right to peaceful assembly and the powers that the National Police Service is given and whether it is time to recall peace keeping mission between the civilians and the police. At the end, it arrives at a final conclusion and makes various recommendations to fill the identified gaps.

---

<sup>1</sup> Kenya 2017 Human Rights Report (20) < <https://www.state.gov/documents/organization/277255.pdf>> accessed on 1<sup>st</sup> June,2019.

## **LIST OF INSTRUMENTS**

### **National Legislation**

The 2010 Constitution of Kenya.

National Police Service Act No.11A of 2011.

National Police Service Commission No.30 of 2011.

Public Order Act Cap.56.



## **TABLE OF INTERNATIONAL INSTRUMENTS**

African Charter on the Rights and Welfare of the Child (ACRWC).

The African Charter on Human and People's Rights (ACHPR).

International Covenant on Civil and Political Rights (ICCPR).

International Covenant on Economic, Social and Cultural Rights (ICESCR).

International Convention on the Elimination of All Forms of Racial Discrimination (1965).

United Nations Declaration on Human Rights Defenders (1998)

## **TABLE OF ABBREVIATION.**

<b>CORD</b>	Coalition for Reforms and Democracy
<b>EACSO</b>	East Africa Civil Society Organizations' Forum
<b>GSU</b>	General Service Unit
<b>KNHRC</b>	Kenya National Human Rights Commission
<b>NPS</b>	National Police Service
<b>ICCPR</b>	International Covenant on Civil and Political Rights
<b>IEBC</b>	Independent Electoral and Boundaries Commission
<b>IMLU</b>	Independent Medico Legal Unit
<b>IPOA</b>	Independent Policing Oversight Authority
<b>NASA</b>	National Super Alliance
<b>NGO</b>	Non-Governmental Organization
<b>OHCHR</b>	Office of the High Commissioner for Human Rights
<b>POP</b>	Problem Solving Police
<b>UN</b>	United Nations

## CHAPTER ONE

### INTRODUCTION

#### 1. Introduction

In the previous general elections, there were allegations and reports on abuse of the right to demonstrate. Kenya 2017 Human Rights Report shows that civilian authorities at times did not maintain effective control over the security forces. The most significant human rights included the freedom of assembly.<sup>2</sup> This is because police routinely denied requests for meetings filed by human rights activists, and authorities dispersed persons attending meetings that had not been prohibited beforehand.<sup>3</sup> It affected the children, youths and adults in various ways.

These heavy deployments fueled political tensions ahead of the vote and exacerbated the unrest that followed the announcement of the results in which security forces sometimes used unlawful and excessive force to disperse protests.<sup>4</sup> They used live ammunition, tear gas and pepper spray and beat residents with batons, often under cover of darkness.<sup>5</sup> The UN Human Rights Chief highly condemned this act.<sup>6</sup> Violence spiked episodically in opposition strongholds surrounding the October 26 fresh election, and unconfirmed reports indicate up to two dozen deaths in October and November from a mix of police action and mob violence.<sup>7</sup>

Despite the fact that the Constitution of Kenya, has sought to respectively include the Bill of Rights and National Security Service, have these laws been implemented without prejudice. Commissions like Kenya National Human Rights and Equality Commission, National Police Service Commission and Kenya Policing Oversight Authority have been placed for civilian oversight especially on the issues of violation of human rights. This research, therefore, seeks to analyze whether there was violation of this right in previous general election as alleged. It also addresses the implementation of the right to peaceful assembly as provided for in article 37 of

---

<sup>2</sup> Ibid, page 1.

<sup>3</sup> Ibid, page 19.

<sup>4</sup> Kill those Criminals, Security Forces Violations in Kenya 'August 2017 elections ( Amnesty International, 2017) 1.

<sup>5</sup> Ibid.

<sup>6</sup> Kenya at critical juncture, leaders must act responsibly <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21972&LangID=E>> accessed on 2<sup>nd</sup> June, 2019.

<sup>7</sup> Kenya 2017 Human Rights Report (19) <<https://www.state.gov/documents/organization/277255.pdf>> accessed on 1<sup>st</sup> June, 2019.

the 2010 constitution, the massive challenges in the implementation of this right and it also analyzes whether the General Service Unit (GSU) abuses its power during peaceful assemblies.

The research also seeks to look at the deployment of the police during unrest in the country. It also addresses the procedure for obtaining the permit to demonstrate. The study further, interrogates the duties of the police as provided for in the Constitution .It also aims to balance the right to peaceful assembly and the powers that the National Police Service is given and whether it is time to recall peace keeping mission between the civilians and the police. National Security and Human rights are both obligations of the state and must be adhered to with respect to Article 2 of the Constitution. The services must not favor or act in a way that damages any political interest.<sup>8</sup> The primary object of the national security organs and security service is to promote and guarantee national security in accordance with the principles mentioned in Article 238(2) of the 2010 constitution.

### **1.1 Definition of Terms**

1. National Security is the protection against internal and external threats to Kenya's territorial integrity and sovereignty, its people, their rights, freedoms, property, peace, stability, and prosperity, and other national interests.<sup>9</sup>

2. Human rights are rights inherent to all human beings, whatever our nationality, place of residence, sex, national or ethnic origin , color, religion, language, or any other status.<sup>10</sup>Everyone is equally entitled to human rights without any discrimination. These rights are all interrelated, interdependent and indivisible.

3. Right to assemble allows persons or group of persons to organize and participate peacefully together and publically convey their opinions and positions to demand action by authorities without fear of threat, harassment, intimidation reprisal or arrest.<sup>11</sup>

4. Service means the National Police Service established in article 243 of the Constitution.<sup>12</sup>

---

<sup>8</sup> Yash Paul Ghai & Jill Cottrell Ghai, Kenya's Constitution; an Instrument for Change (first published 2011) 113.

<sup>9</sup> Constitution of Kenya (2010),Chapter Fourteen, Article 238(1).

<sup>10</sup> Ohchr.org (2017), OHCHR/What are Human Rights.

<sup>11</sup> The right to freedom of peaceful assemblies; *A checklist for the Kenyan Police and the Public* (4)<<https://www.knchr.org/Portals/0/Statements/The%20Right%20To%20Freedom%20of%20Peaceful%20Assembly.pdf?ver=2017-07-27-112500-287>>accessed on 1<sup>st</sup> March,2019.

## 1.2 Background

In 2010 after promulgation of our very own Constitution, the creation of the National Police Service has been recognized by the Constitution, the National Police Service Act 2011 and the National Police Service Commission Act 2011.<sup>13</sup> It consists of the Administration Police and the Kenya Police Service. General Service Unit is a paramilitary group formed under Kenya Police Service and is established to control rioters' mobs and civil disturbance.<sup>14</sup> In the past, people had rights only because of membership in groups, such as family. Universal Declaration of Human Rights was the first document to list the thirty rights to which everyone is entitled. It has been ratified by Kenya by virtue of article 2(5) and 2(6) of the 2010 Constitution.

The preamble of the 2010 Constitution recognizes that the inherent dignity and of the equal and undeniable right of all members of the human family is the foundation of freedom, justice and peace in the world.<sup>15</sup> It also recognizes that everyone has the right to freedom of peaceful assembly and association.<sup>16</sup> It was also recognized in the previous Constitution of Kenya. In the current Constitution the right to peaceful assembly has also been recognized in article 37. This means therefore, that the state has an obligation to fulfill, protect and promote this right. The state also imposes the duty of obedience and compliance of the law and regulations of the right to peaceful assembly as stated in the Public Order Act Cap 56.

A report submitted by the Commission of Inquiry into the Post Election Violence (CIPEV) shows that elections in Kenya though not all are mostly or allegedly followed with violence that not only occurred in 1992 but also in 1997.<sup>17</sup> In 2017 Kenya also had other general elections. This time round it was not as brutal as was witnessed in 2007. There were numerous reports of police using excessive force in a cruel, inhuman, or degrading fashion during protest.<sup>18</sup> On the contrary, they played a protective role in some areas. They even protected school children and

---

<sup>12</sup> National Police Service Act No.11A of 2011, s2.

<sup>13</sup> < <http://www.nationalpolice.go.ke/pages/search.html>> accessed on 28<sup>th</sup> February, 2019.

<sup>14</sup> National Police Service No.11A of 2011, s24.

<sup>15</sup> *Universal Declaration of Human Rights*, Preamble( General assembly of the United Nations 1949).

<sup>16</sup> *Ibid*, article 20.

<sup>17</sup> *The Cursed Arrow: Organized Violence Against Democracy in Kenya*, April 1992; Republic of Kenya, Report of the Parliamentary Select Committee to investigate the Ethnic Clashes in Western and Other Parts of Kenya ( The Kiliku Report).

<sup>18</sup> Kenya 2017 Human Rights Report (4) < <https://www.state.gov/documents/organization/277255.pdf>> accessed on 6<sup>th</sup> March, 2019..

pregnant women. In *John Harun Mwau & 2 others v Independent Electoral and Boundaries Commission & 2 others [2017] eKLR* the court stated that the ‘Video of Baby Pendo’ relates to protests against the outcome of the said August 8<sup>th</sup> August 2017 elections.<sup>19</sup> There is no doubt that the right to assemble, demonstrate, picket and petition as enshrined under Article 37 is not absolute. It may be limited by law.<sup>20</sup> However, this right must be protected and respected. “Public assemblies are regulated in a way by the Public Order Act. The organizers also ought to seek to achieve peaceful assemblies. The police service has an obligation to assure the public of peace and order.

The public in these respects include both the participants in the peaceful assemblies and picketing as well as the non-participants. There is a positive obligation on the State to facilitate and protect a peaceful exercise of the Article 37 rights.<sup>21</sup> Therefore, this historical background shows connection between The Kenya Police Service, their duties and human rights. They are interdependent. They have an obligation of ensuring that this right is protected whatsoever since it will lead to violation of the right to peaceful assembly. This is because human rights provide for a stable society by minimizing domestic security threats.<sup>22</sup> A frequent concern in the violation of this right and lack of respect has been shown.

### **1.3 Statement of the Problem**

The enactment of a very elaborate bill of rights in the 2010 Constitution represents Kenya’s strongest commitment to fundamental rights and freedom, and genuine political transformation.<sup>23</sup> Kenya Policing Oversight Authority (IPOA) which controls and limits the duties of the National Police service has been on the lookout on how the police treat civilians. A frequent concern in the right to peaceful assembly measures in Kenya, has been its respect for, or lack of human rights. This study shows that there exists a gap between the National Police

---

<sup>19</sup> *John Harun Mwau & 2 others v Independent Electoral and Boundaries Commission & 2 others [2017] eKLR* .

<sup>20</sup> *Ferdinand Ndung’u Waititu & 4 others v Attorney General & 12 others [2016] eKLR*.

<sup>21</sup> *Ibid*.

<sup>22</sup> Balancing freedom and security-modern British Bill of Rights, (The Guardian, June 26, 2006) < <http://www.lse.ac.uk/sociology/assets/documents/human-rights/publications/commonSense.pdf>> accessed on 25<sup>th</sup> February 2019.

<sup>23</sup> Erick Kibet Morusoi, ‘The Right to Freedom of Expression and Its Role in Political Transformation in Kenya’ (2016)10< [http://www.icla.up.ac.za/images/about/staff/fombad/alumni/Morusoi\\_Right\\_2017.pdf](http://www.icla.up.ac.za/images/about/staff/fombad/alumni/Morusoi_Right_2017.pdf)> accessed 25 February 2019.

Service (GSU) and the civilians that require the state to provide respect to its citizens and safeguard their basic and constitutional rights. Concerns have been raised by civil societies and human rights activities on the right to peaceful assembly and their implementations in Kenya. Based on the reports by Kenya Human Rights Commission and other bodies, violation of this right affects the citizens. This is because they can no longer give their opinions freely. During 2017 general election, the violence was mostly centered on the opposition strongholds. Therefore, this study shows that there exist structures within the nation and international law that require the state to accomplish its obligations. This should be taken into consideration because violation of human rights is strongly prohibited in Kenya as we are all equal before the law.

#### **1.4 Justification of the Study**

The purpose of this research is to analyze whether there was violation of the right to peaceful assembly in 2017 general election and address the poor implementation of this right by the civilians and the National Police Service .My topic is important because it is based on Human Rights. Human rights are inherent to all human beings .Kenya’s Constitution contains the Bill of rights. This Chapter approximate to the standards provided for under international standards on human rights.<sup>24</sup> However, the constitutionalisation of freedom of assembly has not resulted in the enjoyment of this right because the entrenchment of this freedom has not, in most instances, been followed by the creation of an enabling environment in law and in practice at the International and national and county level in Kenya.<sup>25</sup>Allegations were made concerning the brutality of the police during 2017 general election. Reports such as Kenya 2017 Human Rights Report and Amnesty International Reports were also published concerning the infringement of this right.

This research, therefore, aims to fill the gap that has been left open by our legislators. The GSU has not taken this seriously that has led to poor implementation of this right that not only outlines the protective legal measures but also give guidance on how to exercise it in order to stop the rampant abuse of this right.The data collected through this research has the potential to be used to raise awareness on the right to demonstrate, to provide information for the government to use in an effort to create or improve prevention plans and training regarding the National Police

---

<sup>24</sup> Freedom of association and assembly; *Unions, NGO’s and Political Freedom in Sub-Saharan Africa* (article 19, 2001) 85.

<sup>25</sup> Ibid.

Service where this is not typically considered. In so doing, it will reduce the risk of violating this constitutional right, improve policies and procedures for obtaining permit and set the standards for training of the GSU higher.

### **1.5 Hypothesis**

This study seeks to approve that;-

- 1) Kenyans do not enjoy full protection of the right to demonstrate.
- 2) Kenyans lose many lives during these peaceful assemblies.
- 3) The right to demonstrate in Kenya is not realized.

### **1.6 Limitations of the Study**

This research, however, is submitted to several limitations;-

This research is based on approved reports submitted by Kenya Human Rights Commission and other related Non-Governmental Organizations between 2017 and 2019. Especially on matters of death and brutality caused to civilians by the National Police Service and due to this there is limited access to data. The qualitative analysis method of research, that is “desk review” or library based research was used in the entire case study. The research consulted and analyzed primary and secondary sources such as the Constitution, Statutes, Treaties and Case law all which formed the basis of this study.

The research also internalized and reviewed secondary sources such as books, dissertations, articles and journals in extensive. The research used opposition areas as a case study. The case study used provided a valuable understanding of the violation of the right to demonstrate. The opposition areas were selected because “ peaceful assemblies” took place in these “hotspots” areas and the level of violation of the right to demonstrate differs from one place to another. Thus, this forms a good basis for understanding the violation of this right.

### **1.7 Literature Review**

The issue of violation of the right to demonstrate raised concerns in 2017 general election, but there is scarce literature review on this area. Not so much attention has been given to this area. Thus this has been under-researched and many scholars have failed to investigate the available literature conducted on this issue; overwhelmingly focus has concerned itself from a legal



dimension, human rights activities, human rights bodies and reports who have argued out the issue of the violation of the right to demonstrate from Kenyans lacking the enjoyment of the fundamental rights and freedoms entitlements.

This view is exemplified from a Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association where research was conducted and identifies global trends through this work in the different regions with regard to the exercise of the rights to freedom of peaceful assembly and of association as follows; Use of legislation to suppress the legitimate exercise of freedom of peaceful assembly and association, criminalization, indiscriminate and excessive use of force to counter or repress peaceful protest ,restrictions targeting particular groups and limitations of rights during electoral periods .<sup>26</sup>The study recommended legal reforms to address the issue of violation of the right to demonstrate.

Furthermore, human rights bodies such as KHRC, UNHCR, UN General Assembly and OHCHR in their extensive studies concerned on the legal gaps and shortcomings that aid in the proliferation of violation of this right across the globe, and the dire need for states to reform in ensuring protection of the right to demonstrate. The literature drawn from Kenya has put more focus on the protection of human rights and fundamental freedoms contained in the Constitution of Kenya. In light of this, Kenya Human Rights Reports are going to be examined. A report submitted by Kenya Human Rights Commission details out security agencies as one of the main perpetrators of human rights.<sup>27</sup> The report focuses on analysis of specific human rights violation committed by security agencies one of them being policing public protests. <sup>28</sup>Police were also implicated in hundreds of death in the post-election violence. <sup>29</sup>The report shows that one of the most notable rights that have been trampled upon is the freedom of assembly under article 37 of the Constitution.<sup>30</sup> In mid-2016, the Coalition for Reforms and Democracy (CORD) organized a series of public protests and peaceful assemblies the anti-IEBC peaceful assemblies calling for the disbandment of the Independent Electoral and Boundaries Commission (IEBC) ahead of

---

<sup>26</sup> Human Rights Council, *Report of the Special Rapporteur on the Right to Freedom of Peaceful Assembly and of Association* (A/HRC/38/34, 2018)2.

<sup>27</sup>Kenya Human Rights Commission, *Kenya Scorecard on Security and Justice; Broken Promises and Unfinished Reports* (July 2017) 13.

<sup>28</sup> Ibid.

<sup>29</sup> Waki Commission, *Report of the Commission of Inquiry into Post-Election Violence*.

<sup>30</sup> Kenya Human Rights Commission, *Kenya Scorecard on Security and Justice; Broken Promises and Unfinished Reports* (July 2017)22.

2017 elections.<sup>31</sup> IPOA and human rights activities established that the police used excessive force on vulnerable persons including women, children, and persons with disabilities and subjected the protesters to police brutality and harassment, arbitrary arrests and unlawful detentions.<sup>32</sup> However, the security and safety of all Kenyan citizens is an obligation that is solely vested in National Security Organs like National Police Service among others. <sup>33</sup>The Police are mandated to discharge the obligations and duties as per the law. Despite all these, persistent trends of violations include undue force in policing of public protest and human rights abuses.<sup>34</sup>

The shortcomings of this research are that it fails to address the investigation and prosecution of the police that were involved in this violation. It also fails to address the IEBC protests killings. The report also shows that it only protect citizens and lives out the non-citizens. Finally, the report gives a recommendation that it will enhance accountability of security agents who engage in violation of human rights. This will include criminal and civil liability of the individual and command level. Through this, it failed to recommend procedures on how this will be established and also inclusion of international laws since as a country we have also ratified international laws.

On 8<sup>th</sup> August 2017, Kenya held its second general elections after the promulgation of the 2010 constitution. After the results were announced civilians did not maintain effective control over the security forces.<sup>35</sup> One of the most significant issues was restriction of the right to peaceful assemblies.<sup>36</sup> This was a result of impunity.<sup>37</sup> Police routinely denied requests for meetings that had not been prohibited.<sup>38</sup> The violence spiked in opposition areas.<sup>39</sup> The research indicates that Kalenjin officers were sent to opposition areas as well as kikuyu officers in order to engage in coercion on behalf of the run-up to an election.<sup>40</sup> During this time, police shooting of unarmed

---

<sup>31</sup> Ibid.

<sup>32</sup> Ibid.

<sup>33</sup> Kenya Human Rights Commission, *Dumisha Haki na Uongozi Mwema Kenya; A status Brief and People's Manifesto for Political and Policy Engagement* ( July 2017) 10.

<sup>34</sup> Ibid.

<sup>35</sup> Kenya Human Rights Report (2017) 20.

<sup>36</sup> Ibid.

<sup>37</sup> Ibid.

<sup>38</sup> Ibid.

<sup>39</sup> Mai Hassan, ' the Strategic Shuffle: Ethnic Geography, the Internal Security Apparatus and Elections in Kenya' (2017)13<[https://deepblue.lib.umich.edu/bitstream/handle/2027.42/136510/ajps12279\\_am.pdf?sequence=1&isAlloved=y](https://deepblue.lib.umich.edu/bitstream/handle/2027.42/136510/ajps12279_am.pdf?sequence=1&isAlloved=y)> accessed on 30<sup>th</sup> May,2019.

<sup>40</sup> Ibid.

demonstrators was serious enough to constitute potential crimes against humanity.<sup>41</sup> Out of all governmental operations, the police function is the most crucial work. It represents most visible and powerful interaction between the government and the public.<sup>42</sup> If the police perform their role, effectively, society benefits immeasurably and government scores high.<sup>43</sup> If the police perform the duties poorly, they damage police confidence and democratic principles can be irreparable.<sup>44</sup> The literature review of the above study focused more on the violation of the right to demonstrate by the police. Instead, they have left a gap of which is the enforcement of this right by the police and also by the civilians.

However, this may be partly blamed on the scarce writings and scholarly works touching on the issue of violation of this right to demonstrate as embodied in the society. In conclusion, the above study remains informative and valuable in understanding the violation of the right to demonstrate from a Kenyan perspective. This may be attributed by the fact that the above writers and reports were published and written by human right activist and this may have agitated them to document the issue of violation of this right as rooted in our community (Kenya) and from the experiences they may have encountered as members of the Kenyan community. Henceforth, the right to demonstrate should be granted to everyone without any discrimination or political interference.

## **1.8 Theoretical Framework**

This research acknowledges and is based on Utilitarianism and Retributive theories.

### **1.8.1 Utilitarianism Theory**

The Utilitarianism theory is attributed to Bentham, a jurist, economist and social reformer and was also the leader of the group of philosophical radicals who espoused the doctrine of utilitarianism, which is defined by virtues in terms of utility. According to Bentham, the

---

<sup>41</sup> Stephen Brown, Chandaria Sriram, 'The Big Fish won't Dry Themselves: Criminal Accountability for Post-election Violence in Kenya' (2012) 5 << [https://watermark.silverchair.com/ads018.pdf?token=AQECAHi208BE49Ooan9kkhW\\_Ercy7Dm3ZL\\_9Cf3qfKAc4\\_85ysgAAAKEwggI9BgkqhkiG9w0BBwagggIuMIICKgIBADCCAi](https://watermark.silverchair.com/ads018.pdf?token=AQECAHi208BE49Ooan9kkhW_Ercy7Dm3ZL_9Cf3qfKAc4_85ysgAAAKEwggI9BgkqhkiG9w0BBwagggIuMIICKgIBADCCAi) > accessed on 27<sup>th</sup> April, 2019.

<sup>42</sup> Influence on the Motivation on Performance in the Public Security Sector with a Focus to the Public Force in Kenya, [3] 23 (2012) 2 < [http://www.ijbssnet.com/journals/Vol\\_3\\_No\\_23\\_December\\_2012/20.pdf](http://www.ijbssnet.com/journals/Vol_3_No_23_December_2012/20.pdf) > accessed on 27<sup>th</sup> April, 2019.

<sup>43</sup> Ibid.

<sup>44</sup> Ibid.

principle of utility subjects us to a sovereign master. The principle allows a man to approve or disapprove of an action according to its tendency to promote or oppose his happiness. This theory also focuses on the pain and pleasures. Bentham defined law as an ``assemblage of signs declarative of a volition conceived or adopted by the Sovereign in a State, concerning the conduct to be observed in a certain case by a certain person or class of persons, who in the case in question are or are supposed to be subject to his power.’’<sup>45</sup>Bentham also argued that the task of legislators is to study the law so as to recognize the good. He also stated that legislation should have three ultimate goals which include; providing substance, providing security and to diminishing inequalities. Therefore, there can be no justification in prohibiting an act which is unlikely to produce harm.

Utilitarianism opines that the punishment of an offender should be in accordance with the offence and the punishment should demonstrate that it can help in reforming the offender. It should not be excessive because it should act as a warning. Utilitarianism is relevant to this research because most people in Kenya would like to practice their constitutional right but it is impossible sometimes. Therefore, if it is possible, Kenyans are likely to be subjected to pains and pleasures such as brutality by the police but also the government can listen to them respectively. Transparency connotes democracy. Hence, in this case Kenyans should be allowed to practice their basic constitutional rights so that the government can hear them or their opinions. Any person who violates this right should be punished by the law accordingly, is it the police or the civilians. Henceforth, this study argues that the main purpose of legislation is to provide security and to ensure that citizens are able to enjoy their rights other than suffer.

### **1.8.2 Retributive Theory**

Retributive means give back.<sup>46</sup> Give back the offender what he has given the victim that is crime.<sup>47</sup> Crime is defined as any wrong before the public which is punishable in criminal proceedings. <sup>48</sup>For over a quarter of a century criminal punishment has emphasized the retributive as the principal justification with an emphasis on the degree of deprivation as a

---

<sup>45</sup> Curzon L.B, *Lecture Notes on Jurisprudence*, ( 2<sup>nd</sup> ed, Caverdish Publishing Limited, 1998)61.

<sup>46</sup> Vanessa Konoke, *Retributive Justice* (rin Verlag 2009)3.

<sup>47</sup> Ibid.

<sup>48</sup> Donald H J Hermann, ' Restorative Justice and Retributive Justice: An Opportunity for Cooperation or an Occasion for Conflict in the Search for Justice' (2017)72<<https://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=1889&context=sjsj>> accessed on 27<sup>th</sup> April, 2019.

significant measure of the appropriate sanction.<sup>49</sup> Retributive theory, therefore, is based on the following three principles, that those who commit certain kinds of wrongful acts morally deserve to suffer a proportionate punishment and that it is intrinsically morally good if some legitimate punisher gives them the punishment they deserve and that it is morally impermissible to inflict disproportionately large punishments on wrongdoers or innocent people.<sup>50</sup>

However, retributive still remains a challenge in the community. ‘‘The central question is to what extent is it relevant to a retributive theory of punishment that people adapt to fines and imprisonment? Virtually all retributivists seem to believe that more serious crimes should generally be punished more severely than less serious crimes. Various retributive theories supply different reasons for proportionality's importance. <sup>51</sup>Thus, the retributive punishment should mirror the offense for it not to be illegal or violate the grund norm of the land. A civil code was adopted by the Swiss Parliament in 1907, dealing with the Law of Persons, Family Law, Law of Succession, Law of Property and Law of Obligations and it was also drafted on the basis of justice to a civilian.<sup>52</sup>

The main aims of codification are that the law will be more comprehensible, certain and clearer than it is todayl.<sup>53</sup>The theory considers only the previous done offenses. Even if there will be no repeat offenses, punishment seems necessary because the offender shall not get away with his brazenness. The severity of the offense and the punishment is determined by several factors like the magnitude of the caused harm. Therefore, the law will basically looks at the mens rea and actus reus of the person.<sup>54</sup>Before one is crucified, the state through the prosecution before a judge must establish that the person is guilty for violation of the law. <sup>55</sup>Through this it raises a

---

<sup>49</sup> Ibid, 84.

<sup>50</sup><https://plato.stanford.edu/entries/justice-retributive/>> accessed on 27<sup>th</sup> April, 2019.

<sup>51</sup> Jonathan Masur, John Bronsteen, Christopher Buccafaso, ‘ Retribution and the Experience of Punishment ’(2010)1467<[https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=10314&context=journal\\_articles](https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=10314&context=journal_articles)> accessed on 27<sup>th</sup> April, 2019.

<sup>52</sup> Curzon L.B, *Lecture Notes on Jurisprudence*, ( 2<sup>nd</sup> ed, Caverdish Publishing Limited, 1998) 292.

<sup>53</sup> Ibid, 294.

<sup>54</sup> Vanessa Konoke, *Retributive Justice* (Grin Verlag 2009)3.

<sup>55</sup> Donald H J Hermann, ‘ Restorative Justice and Retributive Justice: An Opportunity for Cooperation or an Occasion for Conflict in the Search for Justice ’(2017)72<<https://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=1889&context=sjsj>> accessed on 27<sup>th</sup> April, 2019.

legal problem between condemnation and reconciliation of the law. The goal of retributive justice is to restore the relationships that have been broken that is a defendant must be punished only to the extent necessary to restore the relationships. Therefore, this research is in connection with theory because we rely on the constitution as the grund norm of the country. The constitution provides that one of the major objects of the police is to protect the country and promote peace and order. But as it has been proved on the literature review, this is sometimes not the case in the country. People are harmed and even sometimes killed by the police though not all. But the law will still set some free and others will face the consequences of violating this law.

Therefore, in order to curb this any person who violates this right and the laws set by legislators should face the law and should be given the punishment in equal measures without any mercy so as to help those people who respect the law and let them enjoy. Since the constitution of Kenya provides that no one is above the law, then people should respect each other and promote equality and equity before the eyes of the law.

### **1.9 Research Objectives**

The study will be achieved by analyzing the following specific objectives;

- 1) To understand the right to demonstrate in Kenya.
- 2) To assess the Violation of the right to demonstrate in Kenya and the mandate given to the Police.
- 3) To examine Kenya's experience in 2017 general election.
- 4) To critically examine the protection of the right to demonstrate under Kenyan laws and International laws.
- 5) To recommend solutions to the violation of this right.

### **1.10 Research Questions**

The following key questions as stated below are going to be evaluated in this research;

- 1) Whether the right to demonstrate in Kenya is a fundamental right that belongs to all Kenyans exclusively?
- 2) What barriers limit the full enjoyment and violation of the right to demonstrate in Kenya?

- 3) What were the challenges that were faced during 2017 general election peaceful assemblies and the loss Kenyans received?
- 4) Whether the laws that have been put in place by the government of Kenya are being adhered to and abide by the Police and the Civilians?
- 5) What are the recommendations that can help solve the violation of the right to demonstrate?

### **1.11 Research Methodology**

The qualitative analysis method of research, that is ‘desk review’ or library based research was used in the entire study. The research consulted and analyzed primary and secondary sources such as the Constitution, Statutes, treaties and conventions and case law all which formed the basis of this study. The research internalized and reviewed secondary sources such as books, dissertations, articles and journals in extensive. The research also relied on the reports submitted by Kenya Human Rights Commission or any other report submitted by non-governmental organizations and oversight bodies such as IPOA. The research used 2017 general election as the case study by examining the challenges that were faced when this right was exercised. The case study used provided a valuable understanding of the right to demonstrate in Kenya and the protection of this fundamental human right.

### **1.12 Chapter Breakdown**

This research is organized into five chapters as follows;

**Chapter one** titled **Introducing the right to demonstrate in Kenya** deals with the preliminary subjects such as introduction, background, research questions and objectives, problem statement and its justification, literature review and the theoretical framework;

**Chapter two** titled **Overview of the right to demonstrate in Kenya** details the right to demonstrate in Kenya, content of the right to demonstrate and the regulatory framework for the people of Kenya during demonstration;

**Chapter three** titled **Kenya’s experience in 2017 general elections** covers 2017 as the case study, focuses on the difficulties and problems that resulted out of peaceful assembly during these general elections and critical analysis of the right to peaceful assembly:

**Chapter four** titled **Conclusion of the right to peaceful assembly** covers the conclusions, recommendations and final remarks.



## CHAPTER TWO

### OVERVIEW OF THE RIGHT TO PEACEFUL ASSEMBLY IN KENYA

#### 2.1 Introduction

This chapter lays the foundation of an understanding of the right to peaceful assembly in Kenya as an issue, before delving into other aspects. This chapter also deals with the content of this right, the regulatory framework and jurisprudence from the courts. This chapter will also be discussed in light of international, regional human rights instruments, national laws and the decisions and declarations of the human rights committees established to monitor their implementations.

#### 2.2 Content of the Right to Peaceful Assembly

Over the years the right to peaceful assembly was not given so much attention not until the 2010 Constitution was passed. This is because it is now considered as a basic human right and a fundamental freedom that should be enjoyed by every citizen. This right, however, is not absolute in Kenya. The right to peaceful assembly has an impact on the lives of individuals with regard to social, economic, cultural, and political spheres of persons. One major impact of the right to peaceful assembly is that the people of a democratic country like ours have a right to raise their voice against the decisions and actions of the Government or even to express their resentment over the actions of the government on any subject of social or national importance.<sup>56</sup>

This is because assemblies can be platforms to advocate for change and for people to raise awareness about the issues such as human right and socio-economic rights. The right to assemble peacefully is an essential condition for the exercise of other human rights such as the freedom of expression which is provided for in the Bill of Rights under Article 33. It is also important in the maintenance and development of culture and in the preservation of minority identities. It can also be used as an alternative way of expressing an idea or disappointment to the government other than representation through the chosen leaders. Therefore, the proper running of peaceful assemblies demands for the protection all other rights. This includes freedom of opinion and expression, freedom of association, freedom of thought, conscience, religion or belief, the right to life, and the right to bodily integrity including security, the right to be free from torture and

---

<sup>56</sup> Wilson Olal & 5 others v Attorney General & 2 others [2017] eKLR

cruel, inhumane and degrading treatment or punishment, and the rights to due process, fair trial and effective remedy for human rights violations.<sup>57</sup>

### **2.3 Regulatory Framework of the Right to Peaceful Assembly**

The right to peaceful assembly is a fundamental human right. It allows persons and groups of people to organize and participate peacefully together and publicly convey their positions and opinions and/or to protest and demand action by the authorities without fear of threat, harassment, intimidation, reprisal or arrest.<sup>58</sup> It also gives persons power to gather publicly or privately and collectively express, promote, pursue and defend their common interests.<sup>59</sup> The right includes participation in meetings, protests, strikes, sit-ins, pickets, petitions, processions, demonstrations and other temporary gatherings for a specific purpose.<sup>60</sup> All of these are considered peaceful assemblies. The State has the obligation to respect, protect and fulfill the rights of those peacefully assembled including by protecting them from third parties, for example agents, provocateurs or violent elements.

Therefore, the laws touching on the right to peaceful assembly in Kenya are ; The Constitution, Public Order Act, National Intelligence Service Act, African Charter on the Rights and Welfare of the Child, the International Covenant on Civil and Political Rights, United Nations Declaration on Human Rights Defenders . Kenya has also ratified international law and treaties which shall form part of the law of Kenya.<sup>61</sup> The right to peaceful assembly root back to article 1(1) of the Constitution which states that “all sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution. ”

Article 1(2) further supports this statement by stating that, “the people may exercise their sovereign power either directly or through their democratically elected representatives.” Article 37 provides that “every person has the right, peaceably and unarmed, to assemble, to demonstrate, to picket, and to present petitions to public authorities. ” This right is, however, not

---

<sup>57</sup>Article 19 et al, ‘The Right to Freedom of Peaceful Assembly ; A Checklist for the Kenyan Police and the Public ‘  
5<<https://www.knchr.org/Portals/0/Statements/The%20Right%20To%20Freedom%20of%20Peaceful%20Assembly.pdf?ver=2017-07-27-112500-287>> accessed on 16<sup>th</sup> June 2019.

<sup>58</sup> Ibid.

<sup>59</sup> Ibid.

<sup>60</sup> Ibid.

<sup>61</sup> Constitution of Kenya 2010, article 2(5) (6).

absolute in Kenya. Article 24 of the Constitution states that ,“ a right or fundamental freedom shall not be limited except by law, and then only to the extent the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom , taking into account all relevant factors , including- a) the nature of the right or fundamental freedom, b) the importance of the purpose of the limitation, c) the nature and extent of the limitation, d)the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others and e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve this purpose. ”

The limitations of this right are also reiterated in the Public Order Act Cap 56. Public assemblies are regulated in the Public Order Act. Section 5(2) of the Public Order Act provides that those who organize assemblies must either give notice in advance or obtain police authorization, depending on the type of event. A very limited number of public assemblies are exempted from the authorization requirement and instead only require advance notice to the police a week prior to the event. Police may terminate or cancel an authorized or unauthorized public assembly if there is a “considerable risk of danger to those attending or a serious disturbance. The Act also provides for the penalty which shall be a fine not exceeding fifty thousand shillings or imprisonment for a term not exceeding six months, or both.<sup>62</sup>

The National Intelligence Service Act 2012 proclaims a limitation to this right on officers (only) in Section 39 by stating that, “The right to assemble, demonstrate, picket and petition public authorities set out in Article 37 of the Constitution is limited by prohibiting, the officers from assembling, demonstrating, picketing or petitioning public authorities except for the purposes of maintaining good order and discipline in the Service.” National constitutions shall guarantee the right to freedom of assembly, which shall be understood in a broad manner consistent with regional and international human rights law.<sup>63</sup> Article 2 (5) of the Constitution state that, “the general rules of international law shall form part of the Law of Kenya. Further, article 2(6) of the Constitution also states that, “any treaty or convention ratified by Kenya shall form part of the

---

<sup>62</sup> Public Order Act Cap 56, section 17.

<sup>63</sup> ACHPR, *Guidelines on Freedom of Associations and Assembly in Africa*, 2015 <[http://www.achpr.org/files/instruments/freedom-association-assembly/guidelines\\_on\\_freedom\\_of\\_association\\_and\\_assembly\\_in\\_africa\\_eng.pdf](http://www.achpr.org/files/instruments/freedom-association-assembly/guidelines_on_freedom_of_association_and_assembly_in_africa_eng.pdf)><sup>23</sup> accessed on 22<sup>nd</sup> June 2019.

law of Kenya under the Constitution.” On the laws ratified by Kenya, the right to peaceful assembly is guaranteed under Article 11 of the African Charter and Article 8 of the African Charter on the Rights and Welfare of the Child.<sup>64</sup> This has also been provided for in International Covenant on Civil and Political Rights which details a broad range of underlying and interdependent human rights necessary to realise the rights to protest and assembly. The African Charter on Human and People’s rights under article 10(1) states that “Every individual shall have the right to free association provided that he abides by the law.”

Article 11 also states that “every individual shall have the right to assemble freely with others. The exercise of this right shall be subject only to necessary restrictions provided for by law in particular those enacted in the interest of national security, the Safety, health, ethics and rights and freedom of others.” Article 21 of ICCPR states that, “the right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.”

Article 8(1) (a) of the International Covenant on Economic, Social and Cultural rights states that “The States Parties to the present Covenant undertake to ensure; The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others.” Article 5(ix) of the International Convention on the Elimination of All Forms of Racial Discrimination states that “In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: The right to freedom of peaceful assembly and association.” Further, article 2 of the United Nations Declaration on Human Rights

---

<sup>64</sup> African Charter on the Rights and Welfare of the Child, article 8 <<http://www.achpr.org/instruments/child/>> accessed on 23<sup>rd</sup> June 2019.

Defenders also states that everyone is entitled to this right individually or in association with others are it nationally and internationally. It also states that,` article 1, 2, 5, 6, 7, 8, 9, 11,12 and 13 of the Declaration provides specific protections to human rights defenders, including the rights to meet or assemble peacefully. ”On the other hand, if protests become violent, this does not make the entire assembly unlawful. Police should isolate and arrest violent protestors and protect the right to peaceful of others by letting the assembly continue as long as they remain peaceful. International law has identified six legal principles that should guide and inform state engagement with public assembly.

These principles include the following; legality which requires to states develop a domestic legal framework for the use of force that complies with international standards, precaution provides that feasible steps are taken in planning and conducting a police operation to avoid use of force, necessity demands that the lowest possible level of force necessary should be used, proportionality requires that force should be equivalent to the objective, accountability, and non-discrimination.<sup>65</sup> From the above-mentioned, both the international and national laws provide for the right to peaceful assembly and association. Both laws provide an obligation for Kenya to ensure that this right has been protected, promoted and fulfilled, but contrary to the foregoing, Kenyans continue to suffer under the whims of failure to implement and enforce the laws in favour of them as it was the case in 2017 general election. These laws should be followed and adhered to by the citizens and non-citizens and also by the security personnel to ensure that human rights are protected.

#### **2.4 Jurisprudence from Courts on the Right to Peaceful Assembly**

This section details how the courts have defined the right to peaceful assembly, the limitations given to this right and how they have resolved the issue of violation of the right to peaceful assembly when called upon to adjudicate .This section will also focus on the Human Rights Committee holdings .In the case of *Ferdinand Ndung’u Waititu & 4 others v Attorney General & 12 others*, a case filled by the members of the National Assembly seeking injunctive order as against the Respondents. As against the Respondents, the Petitioners seek orders to restrain the Respondents as well as their members, servants and agents from breaking, storming, possibly

---

<sup>65</sup> KNHR, *The Right to Freedom of Peaceful Assembly; A Checklist for the Kenyan Police*, 23<  
<https://www.knchr.org/Portals/0/Statements/The%20Right%20To%20Freedom%20of%20Peaceful%20Assembly.pdf?ver=2017-07-27-112500-287>> 23<sup>rd</sup> June 2019.

opening the doors or blocking access to the 1<sup>st</sup> Interested Party's premises or offices within Kenya. The Petitioners seek a positive injunction to compel the 9<sup>th</sup> Respondent to ensure security, public safety and observance of the law and order by the other Respondents. The conservatory orders as sought are to last until the determination of the petition. The court held that "demonstrations" and picketing provide an avenue for those who have strong feelings about particular issues to express those feelings.<sup>66</sup> Such expressions may take the form of motionless protests, public meetings, protest marches, press-conferences, sit-ins and even counter-demonstrations. It was also stated that peaceful marches should take place in public roads and not private roads.<sup>67</sup> It was held that the right to peaceful assembly is not absolute as enshrined in the Constitution and it is only the laws that can limit this right.

In the case of *Wilson Olal & 5 others v Attorney General & 2 others* whereby, the petitioner wanted an open discussion of the citizens fundamental right to demonstrate, picket and present petitions to public authorities and the importance of the exercise of the freedom of expression which is closely connected to the Freedom to demonstrate. The petitioner also called for the discussion of the extent to which such rights can be restricted. This is because prior to the "demonstrations" that was planned by the civil society organizations and members of the public to protest against corruption in government and increased insecurities among other things they had already notified the police as required by the laws.

However, during their peaceful assembly the heavily armed policemen denied them entry to the venue and ordered them to disperse by unleashing teargas and also the protestors were violently dispersed. The court stated that the right to peaceful protest is a constitutional right. While freedom of association is not an absolute right, it can only be limited except by laws as specified in the Constitution. The court was of the opinion that article 10(2) of the Constitution provides for the national values and principles of governance which include the rule of law and human rights among others. The court also established that these principles are binding on all state organs, state officers, public officers and all persons wherever any of them applies or interprets the Constitution. Furthermore, it is important to emphasize the rights and fundamental freedoms in the Bill of Rights because (a) they belong to each individual and are not granted by the state

---

<sup>66</sup> *Ferdinand Ndung'u Waititu & 4 others v Attorney General & 12 others [2016] eKLR.*

<sup>67</sup> *Ibid.*

(b) they do not exclude other rights and fundamental freedoms not in the Bill of Rights, but recognized or conferred by law, except to the extent that they are inconsistent with this chapter and (c) they are also subject to the limitation contemplated in the constitution. Furthermore, these limitations are subject to three part test which includes; (a) a limitation will only be acceptable when prescribed by law (b) when it is necessary and appropriate and (c) when the limitation pursues a legitimate aim namely; the interests of national security or public safety, the prevention of disorder or crime, the protection of health or morals and the protection of the rights and freedom of others.

This test must be observed by police and authorities at all times. The court also held that the right to assembly is protected by both international and legal framework that Kenya is a signatory. It was also stated that freedom of speech, right to assemble and demonstrate or peaceful agitation is the basic features of a democratic society.<sup>68</sup> The government, therefore, has to respect and encourage exercise of such rights so long as it is practiced peacefully.<sup>69</sup> The police were found to be guilty of dispersing the crowd violently. In *Boniface Mwangi v Inspector General of Police & 5 others* the petition was prompted mainly by a press release issued by the Coalition for Reforms and Democracy (CORD) on 26 April 2016 urging the members of the public ‘to assemble at the Anniversary Towers with a date with the IEBC’ on Tuesday May 2, 2016 at 10:00a.m. and thereafter every Monday.

The Anniversary Towers happens to house the head offices of the Independent Electoral and Boundaries Commission (IEBC). Similar assemblies were also called for all over the country. The petitioners contended that the respondents and their members ought not to be allowed to go to the premises of the IEBC all in pursuit of their illegal and unconstitutional acts. That article 37 of the Constitution is not absolute and is limited when there is a breach of peace or where the demonstrators are armed. The petitioners also reiterated that the demonstrations as organized are not compliance with the law and were thus legal. The petitioners also relied on the case of *Harold Hodge vs. Pamela Talkin*, that states that a decision of the United States Court of Appeal (District of Columbia Circuit, 28 August 2015) to advance the argument that even demonstrations have boundary lines which must not be crossed. On the contrary, the respondents

---

<sup>68</sup> *Wilson Olal & 5 others v Attorney General & 2 others* [2017] eKLR.

<sup>69</sup> *Ibid.*

stated that they were not opposed to the application being allowed but the demonstrators and picketers as well as the organizers had not notified the Inspector General of Police of the intended demonstrations or picketing. The court stated that peaceful assembly present claw backs that must be done peaceably and unarmed, certain basic rules ought to be observed to help achieve order and space. It was also stated that the perceived limitations on the right to peaceful assembly must be proportionate to the specific need on which they are predicated.<sup>70</sup> They should rely on the principles that the international law has stated. In the case of *South African Transport and Allied Workers Union and Another v Garvas and Others [2012] ZACC 13*, the court summarized the significance of the right to freedom of assembly which is to give a voice to the powerless.

This includes groups that do not have political and economic power. So that through peaceful assembly they are able to present their frustrations to the government and their representatives. However, actions or laws aimed at quelling armed or violent assemblies will therefore not constitute an infringement of this right. This was reiterated in the case of *Commission Internationale de Juristes v Togo*, the African Commission found that the shooting at peaceful demonstrators by the Togolese military was a violation of this right.<sup>71</sup> This can be borrowed by Kenya since we are members of the African Commission and use of excessive force is highly discouraged.

## **2.5 Human Rights Committee**

The Human Rights Committee is the body of independent experts that observers implementation of the International Covenant on Civil and Political Rights by its State parties.<sup>72</sup> The Committee established that Freedom of Opinion and Expression form a basis for the enjoyment of all other rights.<sup>73</sup> That is, freedom of expression necessitates the enjoyment of the right and freedom of assembly and association.<sup>74</sup> On the Concluding Observations Procedure on ICCPR, the

---

<sup>70</sup> *Boniface Mwangi v Inspector General of Police & 5 others [2017] eKLR*.

<sup>71</sup> PLO Lumumba, M.K Mbondenyei, S.O Odero, *The Constitution of Kenya* (LawAfrica Publishing (k) Ltd 2013) 84.

<sup>72</sup> <<https://www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIndex.aspx>> accessed on 20<sup>th</sup> July 2019.

<sup>73</sup> Human Rights Committee, General Comment No.34 Article 19: Freedom of Opinions and Expressions ( para 4) <[https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fGC%2f34&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fGC%2f34&Lang=en)> accessed on 20<sup>th</sup> July 2019.

<sup>74</sup> *Ibid*.



Committee recognized the adoption of the 2010 Constitution. <sup>75</sup>The Committee, however, was concerned at the slow pace of investigation and prosecution into allegations of killings by the police. <sup>76</sup>They were also alarmed at regular reports of serious unlawful use of force by State security forces and as to whether adequate training and planning procedures are in place to prevent excessive use of force in security operations. <sup>77</sup>The Committee suggested that the state party should strengthen its efforts by ensuring that investigation and prosecution of police officers responsible for violation of this right are taken into consideration.<sup>78</sup>The perpetrators must be brought to justice and victims adequately compensated. <sup>79</sup>The State party should also start training programs for security officers including how to deal with crowd behavior with an intention to restraining use of excessive force.<sup>80</sup>

## **2.6 African Commission on Human and Peoples' Rights**

This Commission has been established by the African Charter.<sup>81</sup> The functions of the Commission include; protecting human and people's rights, promoting human and people's rights and interpreting the African Charter.<sup>82</sup> The Commission praised Kenya for Article 37 of the Constitution which allows every person the right, to assemble, peaceably and unarmed, to demonstrate, and to present petitions to public authorities. <sup>83</sup>This, therefore, means that this right should be protected and every citizen should enjoy. The commission also released guidelines that on the right to freedom of peaceful assembly.

The guidelines provide practical advice on how the rights to freedom of association and assembly should be protected. The six guiding principles include the following; Presumption in favour of holding assemblies which states that this right is a fundamental right and should ,

---

<sup>75</sup> Consideration of Reports Submitted by State Parties Under Article 40 of the Covenant; Concluding Observations Adopted by Human Rights Committee at its 105<sup>th</sup> Session ,9-27<sup>th</sup> July 2012; Kenya , 4<[https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=8&DocTypeID=5](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=8&DocTypeID=5)> accessed on 20<sup>th</sup> July 2019.

<sup>76</sup> Ibid.

<sup>77</sup> Ibid.

<sup>78</sup> Ibid.

<sup>79</sup> Ibid.

<sup>80</sup> Ibid.

<sup>81</sup> <<https://www.achpr.org/>>accessed on 20<sup>th</sup> July 2019.

<sup>82</sup> Ibid.

<sup>83</sup> Ibid.

insofar as possible, be enjoyed without regulation .<sup>84</sup>There is also the state's duty to protect peaceful assemblies, legality of the right which requires that any restriction imposed must have a formal basis in law, proportionality which requires the states to use the intrusive means of achieving the legitimate objective being pursued by the authorities should always be given preference, good administration from the security personnel and finally, the principle of non-discrimination.

## **2.7 Conclusion**

This chapter has examined the major causes of the violation of this right, the impact, the laws governing this right that includes international laws, regional and national laws, jurisprudential thoughts on this right and also the comments from Human Rights Committee. It has also demonstrated that violation of this right is highly prohibited under both national and international laws that have been ratified by Kenya. Therefore, these laws place an obligation to the Kenyan authorities to act according to the national, regional and international standards.

---

<sup>84</sup> OSCE, *Guidelines on Freedom of Peaceful Assemblies* (2007) <[https://www.legislationline.org/download/id/8041/file/Guidelines\\_Freedom\\_Assembly.pdf](https://www.legislationline.org/download/id/8041/file/Guidelines_Freedom_Assembly.pdf)><sup>14</sup> accessed on 20<sup>th</sup> September 2019.

## CHAPTER THREE

### CASE STUDY: KENYA'S EXPERIENCE IN 2017 GENERAL ELECTIONS

#### 3.1 Introduction

The 2017 general election is the second one to be held in Kenya after the promulgation of the 2010 Constitution. This Chapter, therefore, is dedicated to understanding how the right to peaceful assembly was protected, fulfilled and promoted during the 2017 general elections. It will also highlight the problems that resulted out of the peaceful assemblies held in different parts of the country. This chapter will focus in Kibera that was termed as hotspot area which is important in understanding the right to peaceful assembly and how it was violated. This chapter also makes an analysis from human rights context, the violations experienced from the civilian which offends human rights law. This has been evaluated in two approaches National laws and International laws.

#### 3.2 Pre-Election Period

The right to peaceful and unarmed meeting protects the right to non-violent prepared gatherings in public and in private. During the political campaigns, officials drawn from the Regular Police, Administration Police, the General Service Unit and the National Youth Service were dispatched to offer security and preserve law and order.<sup>85</sup> In most areas that the Kenya Human Rights Commission (KHRC) monitored the political campaigns, security agencies were present during the events.

There were no primary incidences that had been necessitated with the aid of lack of adequate numbers of security personnel or denial of permits to maintain rallies.<sup>86</sup> It was also noted that the police played a major role in the mapping out of potential hotspots within the country and subsequently deployed officers to those regions to prevent possible escalation of violence.<sup>87</sup> However, the pre-election period in some areas incorporated a sensibly sufficient yet defective voter enrollment process, which incorporated an autonomous review and restorative activities to address a few of numerous blunders in the rundown. While the voter rundown held

---

<sup>85</sup> Kenya Human Rights Commission, *Mirage at Dusk; A Human Rights Account of the 2017 General Elections* (2017) 81 < <http://knchr.org/Portals/0/CivilAndPoliticalReports/MIRAGE%20AT%20DUSK%20-%20A%20Human%20Rights%20Account%20of%20The%202017%20General%20Election.pdf.pdf?ver=2017-10-09-130024-457> > accessed on 27<sup>th</sup> August, 2019.

<sup>86</sup> Ibid.

<sup>87</sup> Ibid.

difficult issues, the presentation of KIEMS biometric voter recognizable proof framework gave a solid shield against various deciding on the Election Day. The degree of political challenge in the different races was high and there was a high political competition that resulted to misunderstandings and later on took peaceful assemblies. Therefore, this shows that security personnel were prepared to observe peace and order in the country but the problem arose when the people felt the need to exercise their right to peaceful assembly due to failure on the part of the IEBC.

### **3.3 Election Period**

The right to security is an essential human right assured in article 29 of the Constitution of Kenya. To promote the enjoyment of this right, country wide security organs and other vital actors play a pivotal role in ensuring that relevant safety laws and regulations are affected.<sup>88</sup>In Kenya, one of the most important processes is to put to test the actualization of this right is the electoral cycle that normally takes place every five years.<sup>89</sup> Therefore, the role of security agencies is creating an environment that is free from intimidation and fear is very important in the country. After the announcements of the results the opposition party was in denial, claiming that Honorable Raila Odinga was the actual winner, and accused the government of manipulation.<sup>90</sup>

Dozens of human beings were reportedly killed, in particular through disproportionate police responses, in keeping with the Kenya National Commission for Human Rights (KNCHR), Human Rights Watch, the Kenya Red Cross and the Independent Medico Legal Unit.<sup>91</sup>The police denied using live bullets, stating that force changed into used handiest towards looters and reported simplest six people killed, and all criminals. The Independent Policing Oversight Authority (IPOA) set up a research team, such as prosecutors from the Office of the Director of Public Prosecutions (ODPP), and welcomed records from the general public. Independent

---

<sup>88</sup> Kenya Human Rights Commission, *Mirage at Dusk; A Human Rights Account of the 2017 General Elections* (2017) 74 < <http://knchr.org/Portals/0/CivilAndPoliticalReports/MIRAGE%20AT%20DUSK%20-%20A%20Human%20Rights%20Account%20of%20The%202017%20General%20Election.pdf.pdf?ver=2017-10-09-130024-457> > accessed on 27<sup>th</sup> August, 2019.

<sup>89</sup> Ibid.

<sup>90</sup> European Union Institution, *European Election Observation Mission; Final Report General Elections 2017(2018)*3 < [https://eeas.europa.eu/sites/eeas/files/eu\\_eom\\_kenya\\_2017\\_final\\_report.pdf](https://eeas.europa.eu/sites/eeas/files/eu_eom_kenya_2017_final_report.pdf) > accessed on 27<sup>th</sup> August, 2019.

<sup>91</sup> Ibid.

Medico Legal Unit (IMLU), another member of East Africa Civil Society Organizations' Forum (EACSOFF) Kenya, showed that the Police generally conducted themselves professionally besides in a few cases together within Migori, Kisumu and Nairobi and Endebes in Trans Nzoia in which chaos erupted and police tortured and injured civilians.<sup>92</sup> Carter Center eyewitnesses found that the casting of ballots and tallying forms during the August 8<sup>th</sup>, 2017 race were commonly well-controlled.<sup>93</sup>

In any case, eyewitnesses noted issues during the consequent procedures of electronically transmitting surveying station results and classification of results at district level counting focuses.<sup>94</sup> While these were intended to take into account careful checks and confirmation of decision results, and should have been conceivable to actualize, the way toward counting also, organizing last outcomes experienced deferrals and an absence of straightforwardness.<sup>95</sup> The circumstance was exacerbated by elevated political strains and angry proclamations by political pioneers.<sup>96</sup>

Fear, intimidation and violence marred Kenya's presidential elections.<sup>97</sup> Police used excessive force against opposition protestors following the selections leaving dozens dead, including at least 33 shot by the police.<sup>98</sup> Senior ruling party officials repeatedly threatened the independence of the judiciary after the Supreme Court annulled the election results.<sup>99</sup> The NGO's Coordination Board threatened human rights and governance organizations with closure and other punitive measures after they criticized the electoral process.<sup>100</sup>

---

<sup>92</sup> East African Civil Society Organisation's Forum, EASCOFF Kenya Chapter 2017 General Elections Update (2017)<sup>3</sup><http://eacsofkenya.org/media-resource/press-releases?download=22:eacsof-kenya-2017-election-update> >accessed on 27<sup>th</sup> August, 2019.

<sup>93</sup> The Carter Center, Final Report; 2017 Kenya General and Presidential Elections (March 7, 2018)<sup>1</sup>[ceproject.org/ero-en/regions/africa/KE/kenya-final-report-national-elections-the-carter](http://ceproject.org/ero-en/regions/africa/KE/kenya-final-report-national-elections-the-carter) > accessed on 27<sup>th</sup> August, 2019.

<sup>94</sup> Ibid.

<sup>95</sup> Ibid.

<sup>96</sup> Ibid.

<sup>97</sup> Amnesty International Report, The State of the World's Human Rights (2018) 20<<https://www.amnesty.org/en/countries/africa/kenya/report-kenya/>> accessed on 27<sup>th</sup> August, 2019.

<sup>98</sup> Ibid.

<sup>99</sup> Ibid.

<sup>100</sup> Ibid.

### 3.4 Excessive Use of Force

The use of excessive force refers to the use of force greater than that which a reasonable and prudent law enforcement officer would use under the circumstances. <sup>101</sup>Under the United Nations Guiding Principles Article 5 provides that Whenever the lawful use of force and firearms is unavoidable, law enforcement officials shall: (a) Exercise restraint in such use and act in proportion to the seriousness of the offence and the legitimate objective to be achieved (b) Minimize damage and injury, and respect and preserve human life (c) Ensure that assistance and medical aid are rendered to any injured or affected persons at the earliest possible moment (d) Ensure that relatives or close friends of the injured or affected person are notified at the earliest possible moment.

Therefore, this means that caution is urged when use of force has to be employed. Thus in case of any injury or a death is caused by the use of force and firearms by security personnel, the police shall report the matter immediately to their senior, in accordance with the principle. According to article 26 of the Constitution, every person has the right to life. A person shall not be deprived of life intentionally.<sup>102</sup> The National Police Service Act 2011 Schedule 6B provides that “Firearms may only be used when less extreme measures are inadequate, and for the following purposes: Saving or protecting the life of the officer or other persons and self-defense or in defense of the other person against imminent threat of life or serious injury.”

The Independent Medico-Legal Unit screens police direct through reports put together by exploited people. IMLU has noticed that the rates of utilization of deadly police prompting extra-legal executions has ascended in the midst of a fuss for basic changes in the police administration and conceivably occasioned by the August eighth Elections and the recurrent surveys in October.<sup>103</sup> However, in the run-up to the 8<sup>th</sup> August election, the police classified opposition stronghold areas of Nairobi, including Mathare, as likely as “hotspots” for election – related violence. <sup>104</sup>In the period following the August election and the Supreme Court’s decision

---

<sup>101</sup> Independent Policing Oversight Authority, *Monitoring Report on Police Conduct During Public Protests and Gatherings; A Focus on the Anti-IEBC Demonstrations (April-June 2016)* (2017) 10.

<sup>102</sup> Article 26, Constitution of Kenya, 2010.

<sup>103</sup> East Africa Civil Society Organizations’ Forum, EASCOF Kenya Chapter 2017 General Elections Update (2017) <http://eacsofkenya.org/media-resource/press-releases?download=22:eacsof-kenya-2017-election-update> >accessed on 27<sup>th</sup> August, 2019.

<sup>104</sup> Amnesty International Report, *The State of the World’s Human Rights* (2018) 223 <<https://www.amnesty.org/en/countries/africa/kenya/report-kenya/>> accessed on 27<sup>th</sup> August, 2019

to annul, supporters of both parties took to the streets in protest. <sup>105</sup>The police used excessive force to disperse protestors who supported the opposition party and demonstrated against the electoral process, including with the ammunition and tear gas.<sup>106</sup>

### 3.5 The Geography of Violence

The infringement portrayed above occurred in regions where the police reaction was inordinate and savagery and caused damage correspondingly.<sup>107</sup> The Kibera is inside the city of Nairobi in Kenya. It is the greatest slum in Africa and the slum condition is debasing and dehumanizing, described by servile neediness. <sup>108</sup>Most of the slum inhabitants are diminished to asking because of absence of work and chances to acquire a living for individual prosperity or arrangement of their families. In Kibera, police conflicted with savage protestors on August 10 and 11 and with a littler gathering of protestors on August 12. At any rate two individuals were slaughtered in conditions that seem, by all accounts, to be unlawful killings, and handfuls were shot and harmed.<sup>109</sup>

Police utilized power and guns that gave off an impression of being inordinate, infringing upon global law and guidelines. Occupants ascribed beatings and shootings, and the expulsion of assemblages of individuals shot by security powers, to GSU fortifications from outside the territory.<sup>110</sup>As in other areas, unrest in Kibera began around Kamkunji and Gatwikera areas as soon as the opposition announced that the IEBC server had been hacked.<sup>111</sup> Protesters at Olympic and Soweto areas in Kiandaa, Kibera, started throwing stones and barricaded the road.<sup>112</sup>Police, parked at Olympic and along the southern bypass, deployed to Olympic and Bombalulu in large numbers and began a “cat and mouse game” with the crowds. Police fired tear gas and shots into the air to repulse the crowd that then advanced again.<sup>113</sup>The police were accused of beating several people that includes, a local businessman described being beaten and

---

<sup>105</sup> Ibid.

<sup>106</sup> Ibid.

<sup>107</sup> Amnesty International, “Kill those Criminals, Security Forces Violations in Kenya’s August 2017 Elections” 21 <[https://www.hrw.org/sites/default/files/report\\_pdf/kenya1017\\_web.pdf](https://www.hrw.org/sites/default/files/report_pdf/kenya1017_web.pdf)> accessed on 19<sup>th</sup> August 2019.

<sup>108</sup> <<https://www.lunchbowl.org/the-kibera.html>> accessed on 19<sup>th</sup> August 2019.

<sup>109</sup> Amnesty International, “Kill those Criminals, Security Forces Violations in Kenya’s August 2017 Elections” 26 <[https://www.hrw.org/sites/default/files/report\\_pdf/kenya1017\\_web.pdf](https://www.hrw.org/sites/default/files/report_pdf/kenya1017_web.pdf)> accessed on 19<sup>th</sup> August 2019.

<sup>110</sup> Ibid.

<sup>111</sup> Ibid.

<sup>112</sup> Ibid.

<sup>113</sup> Ibid.

verbally abused by police, losing many teeth in the process. A university student was shot in the leg near Olympic primary school as he crept to check if the coast was clear, he said.<sup>114</sup> Another, a carpenter, described police aiming at him from a distance as they battled protestors in his neighborhood.<sup>115</sup> He was shot in the ribs. At the time of interview, the bullet was still lodged in his body.<sup>116</sup>

### **3.6 Challenges that Resulted from the Violation of the Right to Peaceful Assembly**

The dynamics of 2017 general elections were heavily influenced by the political and electoral events of the decade. In August 2010, Kenyans overwhelmingly adopted a Constitution that introduced checks and balances and also ensured that human rights are respected throughout the country. Reports indicate that ordinary citizens in the affected areas were willing to participate in exercising their democratic rights but fear of violence kept them away.<sup>117</sup> The pre and post repeat Presidential election period saw a surge in protests, especially in NASA strongholds. Transport was stifled. The roads were barricaded and bonfires lit on the streets, thus it became evidentially challenging for business owners to open their premises for fear of damage, destruction and looting by the protestors.<sup>118</sup>

Areas that saw an upscale in the destruction of property and looting were Nairobi City, Kakamega County, Vihiga County and Kisumu County.<sup>119</sup> The latter was the most predominant. In Kisumu County, the most affected areas were Nyalenda, Chemelili and Kisumu rural.<sup>120</sup> The Commission recorded destruction of property, looting and forceful entry in Supermarkets, general shops, mpesa shops, private homes, private and public motor vehicles and many others. Coincidentally the victims who lost property also suffered harassment and actual bodily injuries.<sup>121</sup> Perpetrators of looting and destruction of property were both security officers and civilians and as witnessed and documented by the Commission's monitors on the ground.<sup>122</sup> In

---

<sup>114</sup> Ibid, 27.

<sup>115</sup> Ibid.

<sup>116</sup> Ibid.

<sup>117</sup> Ibid.

<sup>118</sup> KNCHR, A Human Rights Monitoring Report on the 2017 Repeat Presidential Election 100<  
<http://www.knchr.org/Portals/0/CivilAndPoliticalReports/A%20HUMAN%20RIGHTS%20MONITORING%20REPORT%20ON%20THE%202017%20REPEAT%20PRESIDENTIAL%20ELECTIONS.pdf?ver=2017-12-20-084352-583>> accessed on 20<sup>th</sup> August 2019.

<sup>119</sup> Ibid.

<sup>120</sup> Ibid.

<sup>121</sup> Ibid.

<sup>122</sup> Ibid.



cases where the perpetrators were the police, most victims did not report incidences to the police out of fear of retribution.<sup>123</sup> Therefore, most victims were counting losses because in addition to losing property they lost their sources of income and as well as livelihood. While monitoring post the October 26th, 2017 repeat poll events in different areas, the Commission was committed in knowing how protests affected daily lives of civilians. In this regard, the Commission set to understand whether goods and services would reach usual destinations with the aim of checking on the enjoyment of Economic, Social and Cultural (ECOSOC) rights by the citizen in the post poll era. As events would eventually turn out, the KNCHR observed disruption of road transport services which in turn affected supply of essential goods and services to market places.<sup>124</sup>

The KNCHR came across travelers who complained about hike in fares and shopkeepers who could not open their workplaces due to insecurity and possible looting. Whereas the full extent of the road blockage to the Nyanza region and parts of Nairobi has not yet been completely quantified or determined, the area residents suffered from inadequate supply for their business stocks from the rest of the country. Those that depended on transport sector in form of public transport shuttles and bus liners did not freely operate. Places that needed emergency evacuation in case of natural disasters, security and urgent medical supplies faced challenges.<sup>125</sup> There was also the case of heightened civil society repression. KNCHR had documented a situation where two leading civil society organizations, Kenya Human Rights Commission (KHRC) and AfriCog had been subjected to state sanctioned harassment.

### **3. 7 Critical Analysis of the 2017 General Election**

Under the international laws the first instrument that addresses the right to peaceful assembly is the Universal Declaration of Human Rights. Under Article 20 of UDHR the right to peaceful assembly is one the rights that have been legally guaranteed under International human rights law.<sup>126</sup> The declaration makes it an obligation for states to make sure that citizens enjoy this right. It is however, to be noted that the declaration is persuasive and may not be binding. This is because the Constitution in Kenya is the supreme law of the land. Further, article 21 of the

---

<sup>123</sup> Ibid.

<sup>124</sup> Ibid, 108.

<sup>125</sup> Ibid.

<sup>126</sup> Article 20, Universal Declaration of Human Rights.

ICCPR states that, “the right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.” Therefore, this means that peaceful assembly is a broad term covering all types of gatherings, including peaceful demonstrations. The general rule under Article 21 of the ICCPR states that “any restriction placed on such freedom shall be prohibited, unless it is provided by law, subjected to a strict test of necessity in a democratic society, and imposed only in the interests of national security or public safety, public order, the protection of health and public morals, or of the rights and freedoms of others.”

This has also been reiterated in article 15(2) of the Convention on the Rights of the child. Therefore, in light of what happened in Kenya during the 2017 general election was in violation of the international human rights that has been ratified by Kenya by virtue of article 2(5) and 2(6) of the 2010 Constitution. This is because, freedom of the right to peaceful assembly ensures people can gather and meet, both publicly and privately. Assemblies can also be platforms to advocate for change and for people to raise awareness about the issues that matter to them, whether it is human rights, socio-economic issues or any other right. The right to peaceful assembly, is however, not absolute but should be protected by the state. As the High Commissioner for Human Rights observed in her global report of March 2019:

*“Even in prosperous States, people feel excluded from the benefits of development and deprived of economic and social rights leading to alienation, unrest, and sometimes violence. In recent months, we have seen people across the world take to the streets to protest inequalities and deteriorating economic and social conditions. Their demands call for respectful dialogue and genuine reform. And yet, in several cases, they are being met with violent and excessive use of force; arbitrary detentions; torture; and even alleged summary or extra-judicial killings.”<sup>127</sup>*

Under the municipal law of Kenya also addresses the right to peaceful assembly. Article 1(1) of the Constitution states that all sovereign power belongs to the people of Kenya. The application of the Bill of Rights applies to all laws and binds all state organs and all persons, thus the

---

<sup>127</sup> Article 19, Submissions to General Comment no.37 on Article 21( The Right To Peaceful Assembly) (2018)2.

government is bound by the provisions of the Constitution on the application of the Bill of rights as stipulated in article 37 which provides that “ every person has the right, peaceably and unarmed, to assemble, to demonstrate, to picket, and to present petitions to public authorities. ” Therefore, this means that this right belongs to all the people of Kenya in order to present their issues to the government or public authorities. Further, the constitution states that this right is not absolute and has been limited by the following factors; a) the nature of the right or fundamental freedom, b) the importance of the purpose of the limitation, c) the nature and extent of the limitation, d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others and e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve this purpose.

The Constitution clearly stipulates that the right to peaceful assembly must be enjoyed by every person in the country but there are also limitations to this right. When practicing this right every person should be accorded with equality and human dignity for every person under the law and the enjoyment of equal protection and benefit of the law.<sup>128</sup> The Public Order Act Cap 56, provides that those who organize assemblies must either give notice in advance or obtain police authorization, depending on the type of event. A very limited number of public assemblies are exempted from the authorization requirement and instead only require advance notice to the police a week prior to the event. Police may terminate or cancel an authorized or unauthorized public assembly if there is a “considerable risk of danger to those attending or a serious disturbance.

The Act also provides for the penalty which shall be a fine not exceeding fifty thousand shillings or imprisonment for a term not exceeding six months, or both.<sup>129</sup> The National Intelligence Service Act 2012 proclaims a limitation to this right on officers (only) in Section 39 by stating that, “The right to assemble, demonstrate, picket and petition public authorities set out in Article 37 of the Constitution is limited by prohibiting, the officers from assembling, demonstrating, picketing or petitioning public authorities except for the purposes of maintaining good order and discipline in the Service. “These provisions in my view have not been fulfilled since the

---

<sup>128</sup> Article 27, Constitution of Kenya 2010.

<sup>129</sup> Section 17, Public Order Act Cap 56..

government has not enough action to criminalize those police officers who violated this right during the 2017 general election. The state has violated article 21(1) of the Constitution which gives that state and every organ a duty; to observe, respect, protect, promote and fulfill the rights and the fundamental freedoms in the Bill of Rights. If indeed the state had complied with these provisions, then the plight of the victims of the 2017 general elections during the peaceful assemblies would have been granted justice automatically without the community requesting or advocating for such from the state.

### **3.8 Conclusion**

The chapter has detailed out the pre-election period, the election period and the aftermath that resulted to the challenges faced when the right to peaceful assembly was violated. It has also interrogated from a human rights perspective the failure of the state to respect, promote, fulfill and protect the right to peaceful assembly. What comes out is that both the civilians and the security personnel violated this right. However, the security personnel used excessive force to calm down the situation in some areas that have been discussed above. This offends their human rights and fundamental freedoms as provided under both domestic and international law. It can be argued that until now some families that were affected have not received the justice that they deserved. Kenyan authorities should investigate into the matter and ensure that police officers who found to have used excessive force are held accountable. This in my opinion is the fundamental solution to resolving the historical injustices and the plight of the civilians when practicing the right to peaceful assembly.

## CHAPTER FOUR

### CONCLUSIONS AND RECOMMENDATIONS

#### 4.1 Conclusions

This thesis started with the assertion that the right to peaceful assembly is a human right concern. The discussion, in chapter two, revealed the overview of the right to peaceful assembly, which includes the content of the right to peaceful assembly, regulatory framework, and jurisprudence from the courts, human rights committee and the African commission on human rights. It noted that the right to peaceful assembly is a human right; therefore, it should be protected, fulfilled and promoted. It further noted that it shall not be limited except by law and then only to the extent the limitation is reasonable and justiciable in an open and democratic society based on human right dignity, equality and freedom taking into account all relevant factors, including (a) the nature of the right or fundamental freedom,(b) the importance of the purpose of limitation,(c) the nature and extent of limitation,(d) the need to ensure the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others and,(e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve this purpose.<sup>130</sup>

Chapter three focuses on Kenya's experience during the 2017 general elections. It sought to look at the right to peaceful assembly in the context of general elections. It was discovered that despite its wide acknowledgement across and recognition by the UN, many people still face challenges when practicing this right especially during elections. It analyzed both the pre-election period and the election period. It noted that the police used excessive force than that which a reasonable and prudent law enforcement officer would use under the circumstances. It also noted that the challenges that resulted from the violation of this right during the 2017 general elections include the following; transport was stifled, roads were barricaded, loss of lives, destruction of properties and also many businesses were closed down. It further critically analyzed the 2017 general elections, in which In dealing with the right to peaceful assembly the Kenyan government has the responsibility of guaranteeing the right to those within its jurisdiction and also outside in terms of international human rights law.

---

<sup>130</sup> Article 24, of the 2010 Constitution on Kenya.

It was also argued that the coming into force of the new Constitution, which includes a justiciable right to peaceful assembly together with the recognition of the role played by international human rights law, marked a milestone for Kenya. It means that the government of Kenya is under an obligation to observe, fulfill, promote and protect the right to peaceful assembly always. The right to peaceful assembly is not properly provided for in terms of legislation and policy documents. Another issue is that these right lacks proper implementations from the police officers hence not all people enjoy this right in Kenya. Thus, on the basis of available information the Kenyan government is in violation of the right to peaceful assembly. From the foregoing chapters, the following conclusions can be made;

- 1) That the right to peaceful assembly is a human right issue that needs to be addressed. This is because many Kenyans do not enjoy this right especially before or during general elections.
- 2) Kenya is falling short of its obligations in terms of the Constitution and human rights treaties to observe, respect, promote, protect and promote the right to peaceful assembly.
- 3) Many Kenyans lose their lives, properties and businesses when practicing this right and as a result is affecting and will affect other rights such as the freedom of expression

## **4.2 Recommendations**

In light of the above conclusions, the following recommendations are made with the hope that if they are adopted the realization of the right to peaceful assembly will become a reality. This is because the right to peaceful assembly is an issue that affects all disciplines and as such recommendations on how to deal with it could be many. Most importantly, all the three arms of government, including the functionaries, have a role to play in guaranteeing the respect for and fulfillment of human rights at all times in Kenya. Moreover, all recommendations herein should be adopted together to enable the realization of the right to peaceful assembly.

### **4.2.1 Review of Legal Framework**

With the promulgation of the new Constitution in 2010, many pieces of legislation need to be amended and new ones enacted. The state should enact laws that ensure police officers receive adequate training in the policing of peaceful assemblies. For instance, an amendment should be done in the National Police Service Regulations to entail that training should equip law-

enforcement agencies to act in a manner that avoids escalation of violence and minimizes conflict, and should include soft skills, such as negotiations and meditations. Further, Public Order Act should also have a provision that provides the manner in which effective a comprehensive training to police officers engaged in managing peaceful assemblies is outlined. The National Police Service should urgently establish a comprehensive training on public order management with reference to other international standards. This training could seek for external assistance from USA, Sweden and UK, countries that are already involved in the Police Reform Program under the Ministry of Interior and Coordination of National Government.

This training should be inculcated in the training curriculum using modern methods and best practices from other countries. The training on this area should take into consideration psychological, social and cognitive skills, where establishing a sense of trust in the public, developing a sense of identity in society, and helping the next generation prepare for the future, should be taken seriously in the service. The National Police Act should also develop an improved manual for police officers in which they will be required to report back to the authorities within a specific time. Rule 10 of Part A of the Sixth Schedule of the National Police Service Act, should be adhered to strictly by police officers prominently displaying means of identification including name tags, number of the officers, even on their helmets during peaceful assemblies.<sup>131</sup> This is meant to enhance accountability to individual officers while at the same time ensuring professionalism and discipline in line with article 244 of the Constitution.

#### **4.2.2 Liability and Accountability of Police Officers**

If the force used is not authorized by law, or more force is used than necessary in the circumstances, police officers should face civil or criminal liability, as well as disciplinary action. Police officers should also be held liable for failing to intervene where such intervention may have prevented other officers from using excessive force. Where a complaint is received regarding the conduct of law enforcement officials or where a person is seriously injured or is deprived of his or her life as a result of the actions of law enforcement officers, an effective official investigation must be conducted. There should also be a clear chain of command in the management of public gatherings and protests should be ensured for accountability purposes.

---

<sup>131</sup> Independent Policing Oversight Authority, *Monitoring Report on Police Conduct During Public Protests and Gatherings; A Focus on Anti-IEBC Demonstration*( April –June 2016) 34.

Guidelines and procedures for the policing of public protests and gatherings must be clearly developed, understood and implemented by all officers involved. The guidelines and procedures should allow local commanders to take initiative when a new situation arises. However, taking of such initiative must be done by the commanders while in adherence to the lines of command and control.

#### **4.2.3 Use of Intelligence**

The NPS should enhance intelligence gathering around public order policing to map out the criminal elements who might infringe on freedom of assembly, demonstrations and picketing. The use of intelligence as part of policing of public protests and gathering is essential. Hitherto, the relationship between the Problem Solving Police (POP) units and crime intelligence can not only assist in the planning of deployments at protests and gatherings but also assist the POP unit to identify possible threats and targets proactively.<sup>132</sup> It is incumbent on the intelligence operatives to identify particular trouble makers in the crowd. Thereafter, through a process of planned police interventions by the POP Unit, they develop a strategy to isolate such individuals from the main crowd. This should be done with the organizers of the public protests having their field marshals as well, to promote and protect security of all actors. Use of modern policing skills such as information technology and videography should be encouraged, with tracking of the errant members of the public for later arrests.

#### **4.3 Final Remarks**

This thesis has argued with the need to deal with the peaceful assemblies as a human rights issue. It explained the content of the right to peaceful assembly both at the national and international level. From the national level, the right to peaceful assembly is very fundamental and should be protected. This has also been reiterated in the international regulatory framework. Furthermore, it showed that states will always have obligations to fulfill, promote, and protect the right at all times. It also shows the need for the legislative and policy framework dealing with the right to peaceful assembly to be reviewed. Such reforms would allow for Kenya to fulfill its human rights and constitutional obligations. This study also shows that creating awareness to the public is very paramount and should not be neglected at any point as this will help reduce the violation of this right. In addition, the study shows that police officers should be properly trained to handle

---

<sup>132</sup> Ibid.



public assemblies. There is also the need to encourage mediation and negotiation between the organizers of these events and the police so that agreements can be made on how to run the event so as to avoid violating this right. Kenya has indeed come a long way in regards to civil and political rights. However, numerous hurdles remain from the successful adoption of new laws to implement the Constitution to the need for extensive institutional reforms that enables citizens to enjoy their guaranteed rights. Therefore, the actualization of the above suggestions would help eradicate the issues facing the right to peaceful assembly which is important because the right to peaceful assembly can serve many purposes , including the expression of view and defense of common interest which requires human rights to be promoted and protected thus enabling a democratic society.

## **BIBLIOGRAPHY**

### **Academic paper**

Morusoi E, 'The Right to Freedom of Expression and Its Role in Political Transformation in Kenya' (2016)10<  
[http://www.icla.up.ac.za/images/about/staff/fombad/alumni/Morusoi\\_Right\\_2017.pdf](http://www.icla.up.ac.za/images/about/staff/fombad/alumni/Morusoi_Right_2017.pdf)> accessed  
25 February 2019.

### **Books**

Clark C Gibson, Long D James, 'The Presidential and Parliamentary Elections in Kenya' (December 2007).

Curzon L.B, Lecture Notes on Jurisprudence, (2nd Ed, Caverdish Publishing Limited, 1998).

Ghai Y & Ghai J, Kenya's Constitution; an Instrument for Change (first published 2011).

Konoke V, Retributive Justice (Grin Verlag 2009).

PLO Lumumba, M.K Mbondenyi, S.O Odero, *The Constitution of Kenya* (LawAfrica Publishing (k) Ltd 2013) 84.

### **Journal Articles**

Balancing freedom and security-modern British Bill of Rights, (The Guardian, June 26, 2006) <  
<http://www.lse.ac.uk/sociology/assets/documents/human-rights/publications/commonSense.pdf>>  
accessed on 25th February 2019.

Brown S, Sriram C, 'The Big Fish won't Dry Themselves: Criminal Accountability for Post-election Violence in Kenya' (2012) <  
[https://watermark.silverchair.com/ads018.pdf?token=AQECAHi208BE49Oan9kkhW\\_Ercy7Dm3ZL\\_9Cf3qfKAac485ysgAAAKewggI9BgkqhkiG9w0BBwagggIuMIICKgIBADCCAi](https://watermark.silverchair.com/ads018.pdf?token=AQECAHi208BE49Oan9kkhW_Ercy7Dm3ZL_9Cf3qfKAac485ysgAAAKewggI9BgkqhkiG9w0BBwagggIuMIICKgIBADCCAi)>  
accessed on 4/27/2019.

Hassan M, 'The Strategic Shuffle: Ethnic Geography, the Internal Security Apparatus and Elections in Kenya' (2017)<

[https://deepblue.lib.umich.edu/bitstream/handle/2027.42/136510/ajps12279\\_am.pdf?sequence=1&isAllowed=y](https://deepblue.lib.umich.edu/bitstream/handle/2027.42/136510/ajps12279_am.pdf?sequence=1&isAllowed=y)> accessed on 5/30/2019.

Hermann H J, ' Restorative Justice and Retributive Justice: An Opportunity for Cooperation or an Occasion for Conflict in the Search for Justice' (2017) <<https://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=1889&context=sjsj>> accessed on 27/4/2019.

Influence on the Motivation on Performance in the Public Security Sector with a Focus to the Public Force in Kenya, [3] (2012) <[http://www.ijbssnet.com/journals/Vol\\_3\\_No\\_23\\_December\\_2012/20.pdf](http://www.ijbssnet.com/journals/Vol_3_No_23_December_2012/20.pdf)> accessed on 4/27/2019.

Masur J, Bronsteen J, Buccafaso C, ` Retribution and the Experience of Punishment '(2010) <[https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=10314&context=journal\\_articles](https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=10314&context=journal_articles)> accessed on 27/4/2019.

## **Reports**

Amnesty International Report, The State of the World's Human Rights (2018) .

ACHPR, *Guidelines on Freedom of Associations and Assembly in Africa*, (2015).

Article 19, Submissions to General Comment no.37 on Article 21( The Right To Peaceful Assembly) (2018).

The Carter Center, Final Report; 2017 Kenya General and Presidential Elections (March 7, 2018).

Consideration of Reports Submitted by State Parties Under Article 40 of the Covenant; Concluding Observations Adopted by Human Rights Committee at its 105<sup>th</sup> Session ,9-27<sup>th</sup> July 2012; Kenya.

The Cursed Arrow: Organized Violence Against Democracy in Kenya, April 1992; Republic of Kenya, Report of the Parliamentary Select Committee to investigate the Ethnic Clashes in Western and Other Parts of Kenya ( The Kiliku Report).

Commission of Inquiry into the Post Election Violence Report; NoticeNO.4923.

East African Civil Society Organisation's Forum, EASCOF Kenya Chapter 2017 General Elections Update (2017).

European Union Institution, European Election Observation Mission; Final Report General Elections 2017(2018).

Freedom of association and assembly; Unions, NGO's and Political Freedom in Sub-Saharan Africa (article 19, 2001).

Human Rights Council, *Report of the Special Rapporteur on the Right to Freedom of Peaceful Assembly and of Association (A/HRC/38/34, 2018).*

Human Rights Committee, General Comment No.34 Article 19: Freedom of Opinions and Expressions.

Independent Policing Oversight Authority, *Monitoring Report on Police Conduct During Public Protests and Gatherings; A Focus on the Anti-IEBC Demonstrations (April-June 2016 ) (2017) .*

Kenya Human Rights Commission, *Kenya Scorecard on Security and Justice; Broken Promises and Unfinished Reports (July 2017).*

Kenya Human Rights Commission, *Mirage at Dusk; A Human Rights Account of the 2017 General Elections (2017) .*

Kenya 2017 Human Rights Report (2017) .

Kenya Human Rights Commission, *Dumisha Haki na Uongozi Mwema Kenya; A status Brief and People's Manifesto for Political and Policy Engagement ( July 2017) .*

Kill those Criminals, Security Forces Violations in Kenya 'August 2017 elections (Amnesty International, 2017).

KNCHR, A Human Rights Monitoring Report on the 2017 Repeat Presidential Election .

OSCE, *Guidelines on Freedom of Peaceful Assemblies (2007).*

The right to freedom of peaceful assemblies; A checklist for the Kenyan Police and the Public. Waki Commission, *Report of the Commission of Inquiry into Post-Election Violence*.

### Websites

Kenya at critical juncture, leaders must act responsibly <  
<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21972&LangID=E>>  
[accessed](#) on 2/6/2019.

Ohchr.org (2017), OHCHR/what are Human Rights <  
<https://www.ohchr.org/en/issues/pages/whatarehumanrights.aspx>> accessed on 2/6/2019.

< <http://www.kenyapolice.go.ke/2015-09-07-17-41-13/general-service-unit.html>> accessed on 28/2/2019.

< <http://www.nationalpolice.go.ke/pages/search.html>> accessed on 28/2/2019.

<<https://www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIndex.aspx>> accessed on 20/6/2019.

<<https://www.achpr.org/>> accessed on 20/7/ 2019.